INTERNATIONAL COURT OF JUSTICE

PLEADINGS, ORAL ARGUMENTS, DOCUMENTS

LaGrand Case

(GERMANY *v.* UNITED STATES OF AMERICA)

VOLUME I

COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

Affaire LaGrand

(ALLEMAGNE c. ÉTATS-UNIS D'AMÉRIQUE)

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This case, entered on the Court's General List on 2 March 1999 under number 104, was the subject of a Judgment delivered on 27 June 2001 (*LaGrand (Germany* v. *United States of America), Judgment, I.C.J. Reports 2001*, p. 466).

The documents relating to the case are being published in the following order:

Volume I. Application instituting proceedings; request for the indication of provisional measures; Memorial of Germany.
Volume II. Memorial of Germany *(continuation)*; Counter-Memorial of the United States of America.
Volume III. Counter-Memorial of the United States of America *(continuation)*; Verbatim Records of the Hearings.

*

For the purposes of this edition, the Court has decided that the written pleadings will be reproduced *in full*; it will therefore also include the documents annexed to those pleadings, which are not made available on the Court's website. The reproduction of all the annexed documents in this edition will enable practitioners to appreciate better the full scope of the arguments developed by the Parties in their written pleadings. As usual, the verbatim records of the public hearings appear after the pleadings; these verbatim records are published here in their final corrected versions, providing a useful supplement to the provisional versions made available on the Court's website.

Since the Court wishes to publish these documents as quickly as possible, it has been decided, where technically feasible, to reproduce the pleadings in the form in which they were submitted by the Parties.

Some documents in this edition have thus been scanned, and there are consequently two types of page numbering for the items included in these volumes: in addition to the normal continuous pagination, the original page numbers of the scanned documents are provided in brackets for reference purposes.

The Hague, 2012.

La présente affaire, inscrite au rôle général de la Cour sous le numéro 104 le 2 mars 1999, a fait l'objet d'un arrêt rendu le 27 juin 2001 (*LaGrand (Allemagne c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2001*, p. 466).

Les documents relatifs à cette affaire sont publiés dans l'ordre suivant:

Volume I. Requête introductive d'instance; demande en indication de mesures conservatoires; mémoire de l'Allemagne.
Volume II. Mémoire de l'Allemagne *(suite)*; contre-mémoire des Etats-Unis d'Amérique.
Volume III. Contre-mémoire des Etats-Unis d'Amérique *(suite)*; comptes rendus d'audience.

*

Aux fins de la présente édition, la Cour a décidé que les pièces de la procédure écrite seront reproduites *intégralement*; cette édition comprendra donc aussi les documents annexés auxdites pièces — qui ne sont pas mis en ligne sur le site Internet de la Cour. La reproduction de l'ensemble des documents annexés dans cette édition permettra aux praticiens de mieux apprécier, dans toute sa portée, l'argumentation développée par les Parties dans leurs écritures. Comme à l'accoutumée, les comptes rendus des audiences publiques sont publiés à la suite des pièces de procédure écrite; ces comptes rendus apparaissent ci-après dans leur version finale corrigée — qui complète ainsi utilement la version provisoire mise en ligne sur le site de la Cour.

La Cour souhaitant que lesdits documents paraissent aussi rapidement que possible, il a été décidé, chaque fois que les moyens techniques le permettraient, de reproduire les pièces de procédure en l'état où elles ont été présentées par les Parties.

Ainsi, certaines pièces de la présente édition ont été scannées et, de ce fait, les titres courants du présent ouvrage comportent deux genres de folios: outre la pagination continue habituelle, on trouvera, entre crochets, la pagination d'origine des pièces scannées, à laquelle il faudra se reporter en cas de renvoi.

La Haye, 2012.

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APPLICATION

REQUÊTE

1999
eneral List
No. 104

I. THE AMBASSADOR OF THE FEDERAL REPUBLIC OF GERMANY TO THE NETHERLANDS TO THE PRESIDENT OF THE INTERNATIONAL COURT OF JUSTICE

The Hague, 2 March 1999.

Upon instruction of my Government, I have the honour to submit herewith an Application of the Federal Republic of Germany as well as an urgent request for provisional measures pursuant to Articles 40 and 41 of the Statute of the Court and Articles 73, 74 and 75 of the Rules of Court against the United States of America for violations of the Vienna Convention on Consular Relations.

The request for provisional measures is of extreme urgency. The execution of the German national Walter LaGrand, set to take place in the State of Arizona on 3 March 1999, would deprive both this Court and Germany of the opportunity to have the case decided on its merits.

(Signed) E. von Puttkamer,
Ambassador of the Federal Republic of Germany.

II. APPLICATION OF THE FEDERAL REPUBLIC OF GERMANY

On behalf of the Federal Republic of Germany and in accordance with Article 40, paragraph 1, of the Statute of the Court and Article 38 of the Rules of Court, I respectfully submit this Application instituting proceedings in the name of the Government of the Federal Republic of Germany against the United States of America for violations of the Vienna Convention on Consular Relations (done on 24 April 1963) (the "Vienna Convention"). The Court has jurisdiction pursuant to Article I of the Vienna Convention's Optional Protocol concerning the Compulsory Settlement of Disputes.

I. The Vienna Convention

1. Article 36, subparagraph 1 *(b)*, of the Vienna Convention on Consular Relations (the "Vienna Convention") requires the competent authorities of a State party to advise, "without delay", a national of another State party whom such authorities arrest or detain of the national's right to consular assistance guaranteed by Article 36:

> "If he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner."

2. As the United States stated before the International Court of Justice in its Memorial in the case concerning *United States Diplomatic and Consular Staff in Tehran*,

> "a principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason the channel of communication between consular officers and nationals must at all times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations . . . Article 36 establishes rights not only for the consular officer but, perhaps more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others." (*I.C.J. Pleadings*, p. 174.)

3. In the recent case concerning the *Vienna Convention on Consular Relations (Paraguay* v. *United States of America)*, Judge Schwebel, in his declaration appended to the unanimous Order of the Court for a stay of execution of a national of Paraguay, stated:

> "It is of obvious importance to the maintenance and development of a rule of law among States that the obligations imposed by treaties be com-

plied with and that, where they are not, reparation be required. The mutuality of interest of States in the effective observance of the obligations of the Vienna Convention on Consular Relations is the greater in the intermixed global community of today and tomorrow (and the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States)." (Order of 9 April 1998, *I.C.J. Reports 1998*, p. 259.)

II. Statement of Facts

4. In 1982, the authorities of the State of Arizona detained two German nationals, Karl and Walter LaGrand. These German nationals were tried and sentenced to death without being advised of their rights to consular assistance, as guaranteed to them by Article 36, subparagraph 1 *(b)*, of the Vienna Convention.

It was only in 1992, when all legal avenues at the state level had been exhausted, that the German consular officers were made aware, not by the authorities of the State of Arizona, but by the detainees themselves, of the case in question.

5. It had been, until very recently, the contention of the authorities of the State of Arizona that they had been unaware of the fact that Karl and Walter LaGrand were nationals of Germany.

While maintaining that under the requirement of due diligence and good faith applicable in international relations, the authorities of the State of Arizona should have established the foreign nationality of the detainees (Karl and Walter LaGrand were born in Germany. Their mother was a German national. These informations, gleaned by the authorities of the State of Arizona from the detention forms, clearly laid grounds for further investigation as to the nationality of the detained brothers, and put the onus on the authorities — per Article 36, subparagraph 1 *(b)*, of the Vienna Convention — to determine their nationality and to inform the German consular officers), Germany accepted as true the contention of the authorities of the State of Arizona that they had not actually been aware of the German nationality of the detainees.

However, during the proceedings before the Arizona Mercy Committee on 23 February 1999, State Attorney Peasley admitted that the authorities of the State of Arizona had indeed been aware all along, since 1982, that Karl and Walter LaGrand had been German nationals. It was thus in full knowledge of the German nationality of the detainees that the authorities of the State of Arizona held, tried and convicted Karl and Walter LaGrand without informing them of their rights under Article 36 of the Vienna Convention.

6. The failure to provide the required notification precluded Germany from protecting its nationals' interests in the United States provided for by Articles 5 and 36 of the Vienna Convention at both the trial and the appeal level in the state courts.

7. The possibility cannot be excluded that this lack of consular assistance did have an impact on the criminal proceedings. Indeed, when Karl and Walter LaGrand, finally with the assistance of German consular officers, did claim violations of the Vienna Convention before the federal court of first instance, that court rejected the assertion of this and other claims based on a municipal doctrine of procedural default. Applying this doctrine, the court decided that, because Karl and Walter LaGrand had not asserted their rights under the

Vienna Convention in the previous legal proceedings at state level, they could not assert them in the federal *habeas corpus* proceedings. This municipal law doctrine was held to bar such relief even though, first, Karl and Walter LaGrand were unaware of their rights under the Convention at the time of the earlier proceedings, and second, they were unaware of their rights precisely because the legal authorities failed to comply with their obligations under the Vienna Convention promptly to inform them of those rights.

The intermediate federal appellate court affirmed. Karl and Walter LaGrand's appeal to the intermediate federal appellate court was the last means of legal recourse in the United States available to them as of right.

8. Karl LaGrand was executed on 24 February 1999, after last attempts had failed in front of the Arizona Mercy Committee to prevent the sentence of death being carried out.

The date of execution of Walter LaGrand has been set for 3 March 1999.

III. GERMANY'S EFFORTS TO PREVENT THE CARRYING OUT OF THE DEATH SENTENCES

9. The Government of the Federal Republic of Germany has used every diplomatic means at its disposal in order to prevent the carrying out of the death sentences against Karl and Walter LaGrand. Numerous interventions have been made. Both the President and the Chancellor of the Federal Republic of Germany have appealed to the President of the United States. Foreign Minister Fischer and Justice Minister Däubler-Gmelin have raised the issue with their respective counterparts in the United States Administration and with the Governor of the State of Arizona. Démarches have been undertaken by the German Ambassador to the United States. The German Ambassador and the German Consul-General have appeared before the Mercy Committee of the State of Arizona on the day prior to the execution of Karl LaGrand. They intend to do the same at the hearing of the Mercy Committee that is to decide on the fate of Walter LaGrand.

Germany had asked for the death sentences against Karl and Walter LaGrand to be set aside on humanitarian grounds. Germany was not only motivated by its opposition, in principle, to the death penalty, but by the special circumstances of the case. Indeed, Karl and Walter LaGrand were only 18 and 19 years of age when they committed the crimes. They have spent a total of 15 years on death row, a period which, even by United States standards, is unusually long.

Germany did also raise the issue — to no avail — of a violation of the Vienna Convention. German Foreign Minister Fischer, in a letter to United States Secretary of State Albright dated 22 February 1999, did assert a violation — through negligence — of Article 36 of the Vienna Convention in the case of the two detainees. A detailed Memorandum of the German Government was enclosed in that letter. The United States of America, to this day, has failed to respond.

It was only on 24 February 1999 that the authorities of the State of Arizona did reveal that they had, since 1982, actual knowledge of the German nationality of Karl and Walter LaGrand.

10. Germany was not and is not seeking any relief barring the competent

authorities of the United States from enforcing its criminal law. Germany did and does contend, however, that the competent authorities of the United States must enforce the criminal law by means that comport with the obligations undertaken by the United States in the Vienna Convention.

IV. THE JURISDICTION OF THE COURT

11. Under Article 36, paragraph 1, of the Statute of the Court, "the jurisdiction of the Court comprises . . . all matters specially provided for . . . in treaties and conventions in force".

12. The Federal Republic of Germany and the United States of America are, as Members of the United Nations, parties to the Statute, and are parties to the Vienna Convention and its Optional Protocol concerning the Compulsory Settlement of Disputes. Article I of the Optional Protocol provides:

> "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."

13. Germany therefore submits that, upon the filing of the present Application, the matters in dispute between Germany and the United States concerning Germany's claims under the Vienna Convention lie within the compulsory jurisdiction of the Court.

V. THE CLAIMS OF THE FEDERAL REPUBLIC OF GERMANY

14. The Government of the Federal Republic of Germany claims that

(a) Pursuant to Article 36, subparagraph 1 *(b)*, of the Vienna Convention, the United States was and is under the international legal obligation to Germany, a State party to the Convention, to inform "without delay" any German national, such as Karl and Walter LaGrand, who is "arrested or committed to prison or to custody pending trial or is detained in any other manner" of his or her rights under that subparagraph.

The United States has violated the foregoing obligation in the case of Karl and Walter LaGrand.

(b) Pursuant to Article 36, subparagraph 1 *(b)*, of the Vienna Convention, the United States was and is under the international legal obligation to an arrested national of Germany, such as Karl and Walter LaGrand, to inform him or her "without delay" of his or her rights under that subparagraph.

The United States has violated the foregoing obligation in the case of Karl and Walter LaGrand.

(c) Pursuant to Article 36 of the Vienna Convention, the United States is under the international legal obligation to ensure that Germany can communicate with and assist an arrested national prior to trial. Its failure to provide the notifications required by Article 36, subparagraph 1 *(b)*, of the Vienna Convention, has effectively prevented Germany from exercising its right to carry out consular functions pursuant to Articles 5 and 36 of the Convention. The United States has therefore violated the foregoing obligation.

(*d*) Pursuant to Article 36, paragraph 2, of the Vienna Convention and Article 26 of the Vienna Convention on the Law of Treaties (done on 23 May 1969), the United States was and is under an international legal obligation to ensure that its national law and regulations enable full effect to be given to the purposes of the rights accorded under Article 36 of the Vienna Convention. The United States has violated the foregoing obligation.

(*e*) Pursuant to Article 27 of the Vienna Convention on the Law of Treaties and to customary international law, the United States may not derogate from its international legal obligation to uphold the Vienna Convention based upon its municipal law doctrines and rules, nor upon the basis that the acts in derogation are those of a subordinate organ or constituent or judicial power. The United States has violated the foregoing obligation.

VI. THE JUDGMENT REQUESTED

15. Accordingly the Federal Republic of Germany asks the Court to adjudge and declare

(1) that the United States, in arresting, detaining, trying, convicting and sentencing Karl and Walter LaGrand, as described in the preceding statement of facts, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, as provided by Articles 5 and 36 of the Vienna Convention,

(2) that Germany is therefore entitled to reparation,

(3) that the United States is under an international legal obligation not to apply the doctrine of "procedural default" or any other doctrine of national law, so as to preclude the exercise of the rights accorded under Article 36 of the Vienna Convention; and

(4) that the United States is under an international obligation to carry out in conformity with the foregoing international legal obligations any future detention of or criminal proceedings against any other German national in its territory, whether by a constituent, legislative, executive, judicial or other power, whether that power holds a superior or subordinate position in the organization of the United States, and whether that power's functions are of an international or internal character;

and that, pursuant to the foregoing international legal obligations,

(1) the criminal liability imposed on Karl and Walter LaGrand in violation of international legal obligations is void, and should be recognized as void by the legal authorities of the United States;

(2) the United States should provide reparation, in the form of compensation and satisfaction, for the execution of Karl LaGrand on 24 February 1999;

(3) the United States should restore the *status quo ante* in the case of Walter LaGrand, that is re-establish the situation that existed before the detention of, proceedings against, and conviction and sentencing of that German national in violation of the United States' international legal obligation took place; and

(4) the United States should provide Germany a guarantee of the non-repetition of the illegal acts.

VII. RESERVATION OF RIGHTS

16. The Federal Republic of Germany reserves the right to modify and extend the terms of this Application, as well as the grounds invoked.

VIII. PROVISIONAL MEASURES

17. The Federal Republic of Germany requests the Court to indicate provisional measures of protection, as set forth in a separate request filed concurrently with this Application.

The Hague, 2 March 1999.

(Signed) E. VON PUTTKAMER,

Ambassador of the Federal Republic of Germany
to the Kingdom of the Netherlands.

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES*

DEMANDE EN INDICATION DE MESURES CONSERVATOIRES**

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* It is to be noted that the Court, having found that the circumstances required it to indicate, as a matter of the greatest urgency and without any other proceedings, provisional measures in accordance with Article 41 of its Statute and with Article 75, paragraph 1, of its Rules, did not hold hearings on the matter (cf. *LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*, p. 15, para. 26). *[Note by the Registry.]*

** Il est à noter que la Cour, ayant conclu que les circonstances exigeaient d'elle qu'elle indiquât de toute urgence et sans autre procédure des mesures conservatoires, conformément à l'article 41 de son Statut et au paragraphe 1 de l'article 75 de son Règlement, ne tint pas d'audiences sur la question (cf. *LaGrand (Allemagne c. Etats Unis d'Amérique), mesures conservatoires, ordonnance du 3 mars 1999, C.I.J. Recueil 1999 (I)*, p. 15, par. 26). *[Note du Greffe.]*

REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES OF PROTECTION SUBMITTED BY THE GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY

1. I have the honour to refer to the Application submitted to the Court this day instituting proceedings in the name of the Federal Republic of Germany against the United States of America and to submit in accordance with Article 41 of the Statute of the Court and Articles 73 , 74 and 75 of the Rules of the Court, an urgent request that the Court indicate provisional measures to preserve the rights of the Federal Republic of Germany.
2. The Court has jurisdiction pursuant to Article I of the Optional Protocol concerning the Compulsory settlement of Disputes to the Vienna Convention on Consular Relations.
3. The facts underlying this request are set forth in the Application.

   In 1982, the authorities of the State of Arizona detained two German nationals Karl and Walter LaGrand. These German nationals were tried and sentenced to death without being advised of their rights to consular assistance, as guaranteed to them by Article 36, subparagraph I (b), of the Vienna Convention on Consular Relations (the "Vienna Convention"). It was only in 1992, when all legal avenues at the State level had been exhausted, that the German consular officers were made aware, not by the authorities of the State of Arizona, but by the detainees themselves, of the case in question.

   It had been the contention of the authorities of the State of Arizona that they had been unaware of the German nationality of the detainees. However, at the hearing of the Mercy Committee on 23 February 1999, State Attorney Peasley revealed that the authorities of the State of Arizona had indeed been aware all along, since 1982, that Karl and Walter LaGrand had been German nationals.
4. Germany was unable to protect its interests as provided for in Articles 5 and 36 of the Vienna Convention. Similarly, it was unable to protect its detained national's interests as provided for in those Articles.
5. Karl LaGrand was executed on 24 February 1999 in spite of all appeals for clemency and numerous diplomatic interventions at the highest level by the German Government.

   The date of execution of Walter LaGrand, in the State of Arizona, has been set for 3 March 1999. 5. This urgent request for provisional measures is made in the case of Walter LaGrand.
6. The importance and sanctity of an individual human life are well established in international law. As recognized by Article 6 of the International Covenant on Civil and Political Rights, every human being has the inherent right to life and this right shall be protected by law.
7. Under the grave and exceptional circumstances of this case, and given the paramount interest of Germany in the life and liberty of its nationals, provisional measures are urgently needed to protect the life of Germany's national Walter LaGrand and the ability of this Court to order the relief to which Germany is entitled in the case of Walter LaGrand, namely restoration of the status quo ante. Without the provisional measures requested, the United States will execute Walter LaGrand — as it did execute his brother Karl — before this Court can consider the merits of

Germany's claims, and Germany will be forever deprived of the opportunity to have the status quo ante restored in the event of a judgment in its favour.

8. On behalf of the Government of the Federal Republic of Germany, I therefore respectfully request that, pending final judgment in this case, the Court indicate that:The United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of that Order.
9. In view of the extreme gravity and immediacy of the threat that authorities in the United States will execute a German citizen in violation of obligations the United States owes to Germany, Germany respectfully asks the Court to treat this request as a matter of the greatest urgency.
10. The Government of the Federal Republic of Germany has authorized the undersigned as well as Mr. Gerhard Westdickenberg, Legal Adviser at the Federal Foreign Office, to appear before the Court in any proceedings or hearings relating to this request that the Court may convene in accordance with the Rules of the Court.

The Hague, 2 March 1999

(E. von Puttkamer)
Ambassador of the Federal Republic of Germany
to the Kingdom of the Netherlands

MEMORIAL OF GERMANY

MÉMOIRE DE L'ALLEMAGNE

LAGRAND CASE
(Germany v. United States of America)

MEMORIAL
OF THE
FEDERAL REPUBLIC OF GERMANY

Volume I

(Text of the Memorial)

16 September 1999

Part One

Introduction

1.01 In lodging the present Application, the Federal Republic of Germany asks the International Court of Justice to decide upon a dispute arising under the 1963 Vienna Convention on Consular Relations. It is Germany's claim that by failing to inform Karl and Walter LaGrand, two German nationals, arrested in 1982 on suspicion of capital crimes in Arizona, of their right to consular access, even though the competent authorities were aware of their German nationality from the outset, the United States violated the obligations flowing from Article 36 (1) of the Vienna Convention on Consular Relations. This breach of international law had tragic consequences: Had the German consulate been duly informed, its officials would have immediately provided protection, support and assistance to their nationals, helping in the preparation of their defence, in obtaining competent counsel and in collecting mitigating evidence. Thus, the case of the LaGrands would have been thoroughly investigated, and essential mitigating evidence, mainly located in Germany, would have been presented at the decisive steps of the criminal proceedings. In fact, however, Karl and Walter LaGrand were poorly represented, none of this evidence was produced, and the brothers were sentenced to death. There are compelling reasons to believe that the LaGrands would have escaped the death penalty if the evidence mentioned had been introduced in time.

1.02 However, eight years later, in 1992, when German consular officers were finally made aware of the nationality of the LaGrands and had the opportunity to come to their help, all legal avenues available before the Arizona courts had already been exhausted. According to the domestic law of the United States, the LaGrands were now barred from raising the violation of their right to consular access and from introducing the essential mitigating evidence obtained in the meantime with the assistance of the German Government. There was no effective mechanism available to them anymore to remedy this situation. Thus, the United States also put itself in breach of Article 36 (2) of the Vienna Convention.

1.03 After having learned that two German nationals, Karl and Walter LaGrand, had been sentenced to death, the Federal Republic of Germany, in addition to consular assistance, pursued a variety of activities in order to minimise the consequences of the United States' breaches of the Vienna Convention. In doing so, Germany chose at first the avenue of energetic moral and political appeals because it did not want its steps to negatively affect the legal efforts to save the LaGrands from execution. In particular, Germany was determined to avoid any impression of interfering in pending judicial proceedings. However, after an Arizona State attorney disclosed at the last minute, on 23 February 1999, the shocking fact that the state authorities had known all along, since 1982, that Karl and Walter LaGrand were German, and after Karl LaGrand was executed just one day later, despite most urgent appeals from its highest representatives, Germany decided to bring the case before the International Court.

1.04 Most regrettably, the United States showed itself unimpressed by the Provisional Measures indicated unanimously by this Court and proceeded also to execute Walter LaGrand, thus causing irreparable harm to the rights claimed by Germany.[1] As a consequence, Germany has to modify its original Submissions.

1.05 In pursuing its Application, Germany has limited the remedies it seeks from the Court to what it considers absolutely necessary to ensure that in the future German nationals in the United States will be provided with adequate and timely consular assistance, so that a case as utterly deplorable as that of Karl and Walter LaGrand will not repeat itself.

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[1] *LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999, para. 24.*

1.06 Unfortunately, breaches of the right to consular access appear to be rather common in the United States, as evidenced by the fact that the present Application has been preceded by that of Paraguay in the Case of Angel Francisco Breard only last year. The parallels between the two cases are striking, but there also exist important differences: In the instance of the two German nationals, the efforts of the United States Federal Government to have the competent state Governor suspend the executions were even weaker – if they deserve to be called "efforts" at all.

On the other hand, the parallelism mentioned makes it possible for Germany to deal with several legal arguments developed by the United States before this Court in the Hearings on Provisional Measures in the *Breard* Case, particularly with regard to jurisdiction, already at this stage. Germany hopes that, thereby, its own Case will be able to proceed to the stage of the merits as speedily as possible.

1.07 The questions at issue in the present Case are of an importance which transcends by far the particular litigation at stake. The United States is one of the countries most strongly committed to the protection of the rights and interests of its citizens abroad. In the words of the President of this Court in the *Breard* Case:

> "It is of obvious importance to the maintenance and development of a rule of law among States that the obligations imposed by treaties be complied with and that, where they are not, reparation be required. The mutuality of interest of States in the effective observance of the obligations of the Vienna Convention on Consular Relations is the greater in the intermixed global community of today and tomorrow (and the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States)."[2]

Germany has nothing to add to this. Hence, it is convinced that it is in the interest of both parties to allow this Court to pronounce itself on the substantive legal issues raised in the present Application as quickly and comprehensively as possible.

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[2] *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, Declaration of President Schwebel, I.C.J.*

1.08 Germany wants to emphasise that its Application is not directed against capital punishment, neither in general nor in regard to the way the death penalty is applied in any particular country. This, however, must not be mistaken to mean that Germany does not take a clear and strong stance on the issue of capital punishment:

The death penalty was abolished in the Federal Republic of Germany in 1949 by Article 102 of the Basic Law. Since then, the Federal Government has been especially committed to the world-wide outlawing and abolition of capital punishment. This policy is a reflection of the clear stance by the parliament and the German people, the majority of whom has opposed the death penalty for many years. With its decision of 17 June 1998, the German *Bundestag* unanimously supported the Federal Government's endeavours to bring about the universal abolition of the death penalty.[3]

Reports 1998, p. 259.

[3] The following is a short description of the endeavours of Germany to outlaw the death penalty at the international level:

Within the Council of Europe, Germany supported from the outset the endeavours to encourage member States to abolish the death penalty. Germany played a key role in the elaboration of Protocol No. 6 of 28 April 1983 to the European Convention on Human Rights concerning the abolition of the death penalty.

The Federal Republic of Germany is particularly closely linked with the Second Optional Protocol of 15 December 1989 to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. On 19 November 1980, the Federal Government, along with a few other States, presented the "Draft of a Convention on the Abolition of the Death Penalty in the form of a Second Optional Protocol to the International Covenant on Civil and Political Rights" to the Third Committee of the United Nations General Assembly, which is responsible for human rights issues. Lengthy negotiations involving the substantial commitment of the Federal Government and its diplomatic missions abroad eventually led to the adoption of the Second Optional Protocol.

The Federal Government has also worked assiduously within the United Nations Commission on Human Rights towards the world-wide abolition of the death penalty. It played an active part in negotiating on the resolutions on the abolition of the death penalty at the 53rd and 54th sessions of the Commission on Human Rights (1997 and

1.09 **To state it once again: The Case brought before this Court does not concern the entitlement of the federal states within the United States to resort to the death penalty – however deplorable Germany may find the increasing resort to this inhuman method of punishment in a country with which it otherwise shares such a strong commitment to human rights, based on the inherent dignity of the human person. Neither does Germany intend, or has ever intended, to use the International Court of Justice as a court of criminal appeal. In its Order of 3 March 1999 in the present Case, by which it indicated Provisional Measures *proprio motu*, this Court emphasised that its function is**

1998). At the 55th session of the Commission (1999), a resolution to this effect was sponsored by the European Union as a whole.

During its Presidency of the European Union in the first half of 1999, Germany made substantial improvements to the substance of the resolution of the UN Commission on Human Rights and so was able also to improve the result of the vote as compared to previous years. Its special success lay in obtaining such marked improvement in the result of the vote despite tightening the substance of the text, i.e. the rejection of the death penalty. For the first time, the resolution calls upon parties not to extradite people to States in which they risk being sentenced to death, to await the outcome of both national and international legal procedures before executing a person, and to take account of the consular rights of foreign citizens. These last two points are directly linked to the present case of the LaGrand brothers.

Thirty of the 53 members of the Commission on Human Rights voted in favour of the resolution (1998: 26). Thus, for the first time an absolute majority was achieved. 11 members voted against (1998: 13) and 12 abstained (1998: 12). The number of co-sponsors increased to 72 (1998: 45). On the fringe of the 55th session of the Commission, Germany, in collaboration with the European Commission, the Council of Europe and the British Government, organised a podium discussion on the death penalty's deterrent effect, which most experts on criminology reject. On the basis of this success in the Commission on Human Rights, the European Union intends to table a resolution on the death penalty in the UN General Assembly as well.

In parallel to endeavours at the multilateral level, the Federal Government, together with its partners from the European Union, also calls for the abolition of the death penalty or for the introduction of moratoria in direct contacts with third States. The Federal Government played an essential part in drawing up the guidelines for representations the European Union will make on capital punishment towards third countries, which the General Affairs Council adopted on 29 June 1998. These have since led to a considerable intensification of joint activities opposing the death penalty and especially to a pronounced increase in the number of joint démarches in individual cases of the imposition or execution of the death sentence.

> "to resolve international legal disputes between States *inter alia* when they arise out of the interpretation or application of international conventions."[4]

This is precisely what Germany requests the Court to do.

1.10 Analogously, whenever the following Memorial refers to, explains and analyses certain features of the domestic law of the United States, this is done exclusively for the purpose of elucidating issues raised at the level of international law. Thus, the description of the rule of "procedural default" applied in the U.S. law of criminal procedure[5] is necessary in order to demonstrate the failure of the law of the United States to comply with its obligation under Article 36 (2) of the Vienna Convention on Consular Relations, according to which national law

> "must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

1.11 The present Memorial is divided into seven Parts:

The Introduction (Part One) is followed by a Statement of Facts on the treatment of Karl and Walter LaGrand by the United States criminal justice system, leading to their execution in February/March 1999 (Part Two).

Part Three deals with the issues of the jurisdiction of the Court and the admissibility of Germany's Case. It arrives at the conclusion that the Optional Protocol to the Vienna Convention on Consular Relations provides a basis of jurisdiction which covers the entirety of the claims put forward by Germany, and further, that there exist no circumstances which could make these claims inadmissible.

Part Four sets out in detail the violations of international law committed by the United States which injured Germany in its own rights as well as in those of the LaGrands as its nationals, *i.e.*, the breach of both Article 36, paragraph 1,

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[4] *LaGrand*, *supra* note 1, para. 25.

and Article 36, paragraph 2, of the Vienna Convention on Consular Relations, as well as the non-observance of the Order on Provisional Measures pronounced by this Court on 3 March 1999 by the execution of Walter LaGrand on the same day.

Subsequently, Parts Five and Six of the Memorial establish that these violations of international law entail the international responsibility of the United States vis-à-vis Germany and give rise to the legal consequences attached to such internationally wrongful acts. Part Six then elaborates the remedies requested by Germany: Satisfaction by way of a pronouncement of the wrongfulness of the actions and omissions of the United States which had fatal consequences for the brothers LaGrand, and assurances and guarantees of non-repetition to prevent further violations of Germany's rights and those of its nationals. Thus, Germany wants to repeat that it has limited its requests to those remedies which it considers as the minimum requirements, but also as absolutely necessary, to ensure that German nationals in the United States will have access to adequate consular assistance in the future, as prescribed by the Vienna Convention.

Part Seven contains the Conclusions and Submissions put forward by Germany.

Two companion Volumes contain the materials annexed to the Memorial.

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[5] **See *infra* Part Four, Ch. I. 3. b).**

Part Two

Statement of Facts

2.01 The following Statement of Facts is, to the best of the knowledge and belief of the Government of the Federal Republic of Germany, accurate and complete. It presents the facts which are considered to be of relevance for the decision of the Court on the claims submitted by Germany in the present case.

In the afternoon of 7 January 1982, Karl and Walter LaGrand were arrested by Arizona law enforcement authorities on suspicion of several crimes committed in the morning of the same day at the Valley National Bank in Marana, Arizona, among them the murder of the bank manager. At the time of the alleged crime, Karl was 18 and Walter 19 years of age.

According to the arrest information sheet concerning Karl LaGrand, he was born in Germany.[6] So-called "presentence reports" demonstrate the knowledge on the part of the Arizona authorities of the German citizenship of both Walter and Karl LaGrand. Reports of 22 and 23 April 1982 dealing with an earlier incident, and reports of 2 April 1984 dealing with the crimes committed in Marana each contain the information "Citizen of Germany – resident alien"[7]. Nevertheless, the Arizona authorities did not inform the brothers about their rights under the Vienna Convention on Consular Relations, nor did they notify the German Consulate of their arrest and detention. Neither were the brothers themselves aware of these rights.

2.02 The brothers were detained and put to trial before a jury at the Superior Court of Pima County, Arizona. On 17 February 1984, the brothers were convicted of murder in the first degree, attempted murder in the first degree, attempted armed robbery, and two counts of kidnapping.[8] The brothers were represented by counsel appointed by the Court because they could not afford legal counsel of their own choice.

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[6] ANNEX 1.

[7] ANNEX 2.

2.03 The brothers' attorneys failed to raise the violation of the Vienna Convention or to contact the German consulate on their own initiative. Neither did they raise or investigate mitigating circumstances linked to the upbringing of the brothers in Germany under extremely difficult social conditions. On 14 December 1984, both brothers were sentenced to death for first degree murder and to concurrent jail sentences for the other charges.[9]

Thus, the German nationals were detained, tried and sentenced to death without being advised of their right to consular assistance, as guaranteed to them by Article 36 (1) (b), of the 1963 Vienna Convention on Consular Relations. Neither the authorities of the State of Arizona nor the brothers nor their attorneys informed the German Consulate General in Los Angeles or any other German representative about their arrest, detention, and sentencing. Nor did the State of Arizona inform the brothers or their attorneys on the LaGrands' rights under the Vienna Convention.

2.04 On 30 January 1987, the Supreme Court of Arizona rejected both Walter and Karl LaGrand's appeals by 3 to 2 votes.[10] The lack of consular advice was again not raised by the attorney of the LaGrands or anybody else. However, as far as the quality of Karl LaGrand's representation was concerned, the Arizona Supreme Court concluded that, although Karl's Attorney at that time, David Gerson

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[8] See the statement of facts in the Judgments of the Supreme Court of Arizona *State v. (Walter) LaGrand*, 734 P.2d 563 (Ariz. 1987), ANNEX 3, at pp. 565 ff.; *State v. (Karl) La Grand*, 733 P.2d 1066 (Ariz. 1987), ANNEX 4, at pp. 1067 ff.

[9] For the transcript of the Aggravation-Mitigation (Sentencing) Hearing, see ANNEX 5. For the Judgment of 14 December 1984, see ANNEX 6.

[10] *State v. (Walter) LaGrand*, 734 P.2d 563 (Ariz. 1987), ANNEX 3; *State v. (Karl) LaGrand*, 733 P.2d 1066 (Ariz. 1987), ANNEX 4.

> "kept an exceedingly low profile, we cannot say that his performance was so deficient as to compromise the adversarial nature of the trial."[11]

2.05 On 5 October 1987, the United States Supreme Court denied *certiorari*, that is, it denied to hear the case and confirmed the judgments. The late Justices Marshall and Brennan dissented because they held that the death penalty was a violation of the Eighth and Fourteenth Amendment of the United States Constitution, which prohibit the infliction of "cruel and unusual punishments".[12] Once again, the omission of consular advice was neither raised nor decided upon. Several other extraordinary remedies at the State level remained unsuccessful. In none of these, the issue of consular notification was raised.

2.06 It was only in June 1992, after all legal avenues at the state level had been exhausted, that German consular officers were made aware of the case by the LaGrand brothers. The detainees themselves had learnt of their rights through two other German inmates, and not through the Arizona authorities. Immediately, the German authorities investigated the nationality of the brothers. These investigations by the competent German authorities led to the result that the brothers did indeed possess German nationality.[13] On 8 December 1992, an official of the Consulate General of Germany in Los Angeles visited the brothers in prison to find out what further steps were to be taken to assist them in their legal efforts. In the following, Germany helped the brothers' attorneys to investigate the brothers' childhood in Germany, both by financial and logistical support, and to raise this issue and the omission of consular advice in Court proceedings.

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[11] *State v. Karl LaGrand*, 733 P.2d 1066 (Ariz. 1987), ANNEX 4, at p. 1069.

[12] *Karl LaGrand v. Arizona*, 484 U.S. 872, 108 S.Ct. 206 (Mem.); *Walter LaGrand v. Arizona*, 484 U.S. 872, 108 S.Ct. 207 (Mem.), ANNEX 7.

[13] See *infra*, Part III, Ch. V. 3. and the documents annexed thereto.

2.07 On 24 January and 16 February 1995, the Federal U.S. District Court for the District of Arizona rejected the so-called *habeas corpus* claims of the brothers in four separate orders.[14] In these proceedings, the attorneys raised for the first time the lack of consular advice and the violation of Art. 36 of the Vienna Convention on Consular Relations. The attorneys also raised the inadequate performance of earlier counsel, especially in the case of Karl LaGrand, and other shortcomings in the proceedings. The court rejected the assertion of this and other claims on the basis of the doctrine of procedural default. Applying this doctrine, the Court decided that, because Karl and Walter LaGrand had not asserted their rights under the Vienna Convention in the previous legal proceedings at the state level, they could not assert them anymore in the federal *habeas corpus* proceedings.

The doctrine of procedural default was held to bar such relief even though it became obvious in the proceedings that Karl and Walter LaGrand were unaware of their rights under the Vienna Convention at the time of the earlier proceedings. Further, it became also obvious that the brothers were unaware of their rights precisely because the authorities failed to comply with their obligations under the Convention to inform them of those rights without delay.

2.08 Karl and Walter LaGrand's following appeals to the intermediate (federal) appellate court and the U.S. Supreme Court were the last means of legal recourse in the United States available to them as of right. On 16 January 1998, the (federal) Court of Appeals of the 9th Circuit rejected the brothers' appeals against the judgment of the District Court, confirming, *inter alia*, that the claim of violation of the Vienna Convention was "procedurally defaulted".[15] On 2 November 1998, the U.S. Supreme Court denied *certiorari* against this decision without stating any reasons.[16] At that stage, the brothers LaGrand were finally informed of their right to consular access.[17]

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[14] Order of 24 January 1995, ANNEX 8; Order of 16 February 1995, *LaGrand v. Lewis*, 883 F.Supp. 451 (D.Ariz. 1995), ANNEX 9.

[15] *LaGrand v. Stewart*, 133 F.3d 1253, ANNEX 10, at pp. 1261 f. (9th Cir.).

2.09 On 12 January 1999, the Arizona Supreme Court decided that Karl LaGrand was to be executed on 24 February 1999; on 15 January 1999, the Court decided that the execution of Walter LaGrand was to take place on 3 March 1999.[18] The German Consulate learned of these dates on 19 January 1999.

2.10 During the following days and weeks, Germany decided to pursue several avenues in order to prevent the execution of the brothers. Firstly, the highest German authorities raised the issue in direct diplomatic communications to the United States and Arizona authorities. Secondly, Germany supported the attorneys in their attempts to resort to any remaining domestic legal means. German officials also participated in the clemency hearings before the Arizona Board of Executive Clemency.

2.11 More specifically, as to the activities of the Government of the Federal Republic of Germany, it used every diplomatic means at its disposal in order to prevent the carrying out of the death sentences. Numerous interventions were made. Both the President[19] and the Chancellor of the Federal Republic of Germany appealed to the President of the United States, the latter also to the Governor of Arizona.[20] Foreign Minister Fischer[21] and Minister of Justice

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[16] *LaGrand v. Stewart*, 119 S.Ct. 422 (1998); Rehearing denied on 7 December 1998, 119 S.Ct. 610, ANNEX 11.

[17] For the respective "Notice of Consulate Assistance" to Karl LaGrand of 21 December 1998, see ANNEX 12.

[18] See for the Warrant of Execution concerning Walter LaGrand, ANNEX 13.

[19] Letter of German President Herzog to President Clinton of 5 February 1999, ANNEX 4.

[20] See letter of Chancellor Schröder to President Clinton of 2 February 1999, ANNEX 15; letter of Chancellor Schröder to Arizona Governor Hull of 2 February 1999, ANNEX 16.

[21] Letters of Foreign Minister Fischer to U.S. Secretary of State Albright of 27 January 1999, ANNEX 17, and 22 February 1999, ANNEX 18; to Arizona Governor Hull of 27

Däubler-Gmelin[22] raised the issue with their respective counterparts in the United States Administration and with the Governor of the State of Arizona. Démarches were undertaken by the German Ambassador to the United States. A further démarche followed on behalf of the European Union. Both the German Ambassador and the German Consul-General in Los Angeles explained the German position to the Board of Executive Clemency of the State of Arizona on the days prior to the execution of the brothers. In his second letter to United States Secretary of State Albright dated 22 February 1999, the German Foreign Minister, Joschka Fischer, raised the issue of a violation of the Vienna Convention – to no avail.[23] A detailed Memorandum of the German Government was enclosed in that letter.

2.12 It was only on 23 February 1999 that the authorities of the State of Arizona did reveal that they had, since 1982, had knowledge of the German nationality of Karl and Walter LaGrand. Until that day, Germany had assumed that the Arizona authorities had not been aware of the German nationality of the detainees. However, during the proceedings before the Arizona Board of Executive Clemency on 23 February 1999, State Attorney Peasley admitted that the authorities of the State of Arizona had been aware all along, since 1982, that Karl and Walter LaGrand were German: Reacting to an earlier statement made by a German attorney who had hinted that the Arizona authorities might possibly not have been aware of the German nationality of the brothers at the time they were arrested, Mr. Peasley said:

> "We didn't know, you're told, until ten years after the offence and eight years after, eight years after the conviction, nobody knew that Karl LaGrand was a German citizen. You may recall that being said to you this morning. On the presentence report in this very case which this Board also has, up at the top of that report it says 'Citizen

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January 1999, ANNEX 19.

[22] Letter of Minister of Justice Däubler-Gmelin to Attorney General Reno of 27 January 1999, ANNEX 20.

[23] ANNEX 18.

> of Germany', 'Resident Alien'. Any suggestion that it was not clear, not clear then, is simply untrue."[24]

Further research undertaken in the course of the preparation of the present Memorial confirmed the accuracy of this admission. It was thus in full knowledge of the German nationality of the detainees that the authorities of the State of Arizona, for more than ten years, held, tried and convicted Karl and Walter LaGrand without informing them of their rights under Article 36 of the Vienna Convention.

Such failure to effect the required notification precluded Germany from protecting its nationals' rights and interests in the United States as provided by Articles 5 and 36 of the Vienna Convention at both the trial and the appeal level in the state courts.

2.13 On 24 February 1999 (amended 26 February 1999), the 9th Circuit Court rejected a second *habeas corpus* claim of Karl LaGrand which was based, among other arguments, on the omission of consular notification.[25] The Court held that the latter claim was procedurally defaulted. On the same day, the 9th Circuit Court decided that execution by lethal gas was unconstitutional, and ordered a stay of execution.[26] The U.S. Supreme Court, however, vacated the stay of execution without giving reasons for its decision.[27]

On 23 February 1999, the Arizona Board of Executive Clemency, by 3 votes to 1, rejected the appeals for clemency in the case of Karl LaGrand despite interventions by the German Ambassador to the United States, Mr. Jürgen Chrobog, and other high-ranking German representatives.

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[24] Transcript of a video recording of the proceedings before the Clemency Board on 23 February 1999 (lodged with the Court).

[25] *LaGrand v. Stewart*, 170 F.3d 1158 (9th Cir. 1999), ANNEX 21.

[26] *LaGrand v. Stewart*, 173 F.3d 1144 (9th Cir. 1999), ANNEX 22.

[27] *Stewart v. LaGrand*, 119 S.Ct. 1107 (Stevens and Ginsburg, JJ., dissenting); ANNEX 23.

Karl LaGrand was permitted to choose lethal injection instead of gas and did so. In the evening of 24 February 1999, Karl LaGrand was executed.

2.14 On 23 February 1999, the Arizona Superior Court in Pima County rejected Walter LaGrand's second petition of post-conviction relief of 16 February 1999 as procedurally defaulted.[28] His attorney had *inter alia* raised the lack of consular advice.[29] On 1 March 1999, Walter LaGrand confirmed his choice to die in the gas chamber instead of by lethal injection. On the evening of 2 March 1999, after all domestic remedies had been exhausted, Germany brought an Application before the International Court of Justice and requested Provisional Measures against the execution of Walter LaGrand. On the same day, Foreign Minister Fischer addressed a third letter to Secretary of State Albright referring to Art. 36 of the Vienna Convention and the German Application to the International Court of Justice and requesting her to urge Governor Hull to suspend Walter LaGrand's execution.[30] On 3 March 1999, the International Court of Justice granted the request *proprio motu*. The dispositif of the Court's Order was worded as follows:

> "(a) The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order;
>
> (b) The Government of the United States of America should transmit this Order to the Governor of the State of Arizona."[31]

2.15 On the same day, not only Walter LaGrand but also Germany applied to the U.S. Supreme Court for a stay of execution.[32] In a letter of 3 March 1999 to the Supreme Court, Seth P. Waxman, the U.S. Solicitor General, argued for the U.S. Federal Government that

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[28] ANNEX 24.

[29] See ANNEX 25.

[30] ANNEX 26.

[31] *LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, p. 16 (para. 29).

[32] *Germany v. United States and Jane Dee Hull*, Complaint of 3 March 1999 and supporting materials, ANNEX 27.

> "it is our position that the Vienna Convention does not furnish a basis for this Court to grant a stay of execution."[33]

Concerning the Order of the Court, he was of the opinion that

> "an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief ... ."[34]

The U.S. Supreme Court denied the motion of Walter LaGrand (Justices Stevens and Breyer dissenting).[35] Furthermore, on appeal by the State of Arizona, the Supreme Court reversed a stay of execution ordered by the 9th Circuit Court, holding that Walter LaGrand had waived any claim that execution by gas chamber violated the Constitution (Justice Stevens dissenting).[36] Further, the Supreme Court denied the motion brought by Germany and declined to exercise its original jurisdiction in the case.[37] Two Justices dissented, two other Justices based their decision on the position of the U.S. Government.

2.16 Already on 2 March 1999, the Governor of Arizona, Ms. Jane Dee Hull, had rejected a move for a stay of execution in spite of a respective recommendation of the Arizona Board of Executive Clemency. Her statement read, *inter alia*:

> "[I]n the interest of justice and with the victims in mind, I have decided to allow this execution to go forward as scheduled."[38]

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[33] ANNEX 28.

[34] *Ibid.* For the reply of Germany of the same day, see ANNEX 29.

[35] *LaGrand v. Arizona*, 119 S.Ct. 1137 (Breyer and Stevens, JJ., dissenting), ANNEX 30.

[36] *Stewart v. LaGrand*, 119 S.Ct. 1018, ANNEX 31.

[37] *Germany v. United States*, 119 S.Ct. 1016 (Stevens and Breyer, JJ., dissenting), ANNEX 32.

[38] ANNEX 33.

Apart from communicating the Order of the International Court of Justice to the Governor of Arizona, the United States Federal Government did not undertake any other measure to halt the execution of Walter LaGrand and implement the Order of the Court.

Walter LaGrand was executed on the evening of 3 March 1999 local time in Phoenix, Arizona, by lethal gas.

Part Three

Jurisdiction and admissibility

I. The subject-matter of the present dispute

3.01 The proceedings instituted by Germany in the present case raise questions of the interpretation and application of the Vienna Convention on Consular Relations and of the legal consequences arising from the non-observance on the part of the United States of certain of its provisions vis-à-vis Germany and two of its nationals. It was strictly within the framework of these proceedings and in order to preserve its rights under the Convention that Germany asked the Court to indicate Provisional Measures. These measures were granted by the Court in its Order of 3 March 1999.[39] Since the Provisional Measures were disregarded by the Respondent's competent authorities, Germany was forced to include the consequences of the non-observance of the Order within the scope of the present proceedings.

3.02 Germany will demonstrate that all these issues are covered by one and the same jurisdictional basis, namely Art. I of the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes of 24 April 1963 (henceforth referred to as the "Optional Protocol").[40] With regard to the non-observance of the Order of 3 March 1999, Germany will, in an auxiliary and subsidiary manner, also invoke the inherent jurisdiction of the Court for claims as closely interrelated with each other as the ones before the Court in the present case.

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[39] *LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, p. 9.

[40] 596 UNTS, p. 487.

3.03 Although in this initial phase of the proceedings Germany is under no obligation whatsoever to anticipate any challenges to the jurisdiction of the Court or the admissibility of the case which the Respondent may eventually put forward, Germany will deal with the issues of jurisdiction and admissibility already at this stage in order to provide a solid basis for proceeding to the merits of the present Case as speedily as possible. Thus, if the Respondent were able to concur with the legal views developed in the following, lengthy proceedings on Preliminary Objections could be avoided.

3.04 The questions arising in the present Case are of an importance which transcends the individual litigation at stake. The United States is one of the countries most strongly committed to the protection of the rights and interests of its citizens abroad. Hence, Germany is convinced that it is in the interest of both parties to allow this Court to pronounce itself on the substantive legal issues raised in the present application as quickly and comprehensively as possible. Crucial questions, many of them not yet decided by international judicial bodies, could be clarified, thus strengthening the rule of law in international relations and thereby serving not least the many United States citizens

> "scattered about the world – as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example. Public officials should bear in mind that 'international law is founded upon mutuality and reciprocity' ... The importance of the Vienna Convention cannot be overstated. It should be honored by all nations that have signed the treaty and all states of this nation."[41]

In her letter to the Governor of Virginia in the case of the Paraguayan national Angel Breard requesting a temporary stay of the execution of Mr. Breard, U.S. Secretary of State Albright took the same position, stating that

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[41] Thus the words of Judge Butzner in his concurring opinion in ***Breard v. Pruett***, 134 F.3d 622 (4th Cir. 1998).

> "[A]s Secretary of State ... I have a responsibility to bear in mind the safety of Americans overseas."[42]

3.05 The paramount interest of the United States in the observance of the rules of the Vienna Convention was also underlined by President Schwebel in his Declaration appended to the Order of this Court of 9 April 1998 in the *Case Concerning the Vienna Convention on Consular Relations (Paraguay v. USA* [henceforth referred to as the *Breard* Case]):[43]

> "It is of obvious importance to the maintenance and development of a rule of law among States that the obligations imposed by treaties be complied with and that, where they are not, reparation be required. The mutuality of interest of States in the effective observance of the obligations of the Vienna Convention on Consular Relations is the greater in the intermixed global community of today and tomorrow (and the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States)."[44]

II. The legal bond establishing the jurisdiction of the Court in the present Case

3.06 Germany and the United States are both members of the United Nations, and thus *ipso facto* parties to the Statute of the International Court of Justice (henceforth referred to as "the Statute") which forms an integral part of the Charter of the United Nations (Art. 92, 93 [1]) of the Charter). In this capacity, both States are entitled to make use of the machinery provided by the principal judicial organ of the United Nations (Art. 92 of the Charter) without any further prerequisites *ratione personae* (Art. 35 [1] of the Statute).

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[42] The letter is reprinted in Annex 22 of the Memorial of the Republic of Paraguay of 9 October 1998 in the *Breard* Case. The text of the letter is also to be found in J. Charney/W. Reisman, Agora: Breard. The Facts, 92 *American Journal of International Law* (1998), pp. 671 f.

[43] *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, pp. 248 ff.

[44] *Ibid.*, p. 259.

3.07 In the present Case, the jurisdiction of the Court is based upon Art. 36 (1) of the Statute and Art. I of the Optional Protocol. Art. 36 (1) of the Statute provides that the jurisdiction of the Court encompasses "all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force." The Optional Protocol is a treaty within the meaning of this provision. The use in Art. 36 (1) of the Statute of the expression "in force" does not limit the scope of this provision to treaties concluded prior to the entry into force of the Statute itself, but rather refers to the date of the institution of the respective proceedings. This interpretation is supported by the settled practice of the Court as well as by the unanimous opinion in doctrine and has never been seriously challenged.[45]

3.08 The Vienna Convention on Consular Relations of 24 April 1963[46] and the accompanying Optional Protocol have been ratified by both the United States of America and the Federal Republic of Germany. Neither country has declared any reservations. In accordance with its Art. VIII (1), the Optional Protocol entered into force on 19 March 1967. It became binding upon the United States on 24 December 1969 and upon Germany on 7 October 1971, respectively.[47] It is thus on that latter day that the legal bond establishing the

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[45] See S. Rosenne, *The Law and Practice of the International Court* (1997), vol. II, pp. 659 f., with further references.

[46] 596 UNTS, p. 261.

[47] See Bundesgesetzblatt (German Federal Gazette) 1971 II, p. 1285; international source: Multilateral Treaties deposited with the Secretary-General. Status as at 31 December 1997, UN Doc. ST/LEG/SER.E/16, p. 78. At the time of ratification, Germany was not yet a member of the United Nations. Therefore, in a communication deposited on 24 January 1972 with the Registrar of the International Court of Justice, who transmitted it to the Secretary-General pursuant to operative paragraph 3 of Security Council resolution 9 (1946) of 15 October 1946, the Government of the Federal Republic of Germany stated as follows:

> "In respect of any dispute between the Federal Republic of Germany and any Party to the Vienna Convention on Consular Relations of 24 April 1963 and to the Optional Protocol thereto concerning the Compulsory Settlement of Disputes that may arise within the scope of that Protocol, the Federal Republic of Germany accepts the jurisdiction of the International Court of Justice. This declaration also applies to such disputes as may

jurisdiction of the Court between the two States was created. This legal relationship has remained unchanged ever since.

3.09 In accordance with Art. 102 (1) of the United Nations Charter and Art. 4 (1) (c) of the regulations implementing this provision,[48] the Vienna Convention and the Optional Protocol were registered *ex officio* with the Secretariat of the United Nations on 8 June 1967 (Registration No. 8640).

III. The scope of the Court's jurisdiction under Article I of the Optional Protocol

3.10 Art. I of the Optional Protocol on which Germany bases the Court's jurisdiction in the present Case is worded as follows:

> "Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol."

Germany fully agrees with the view expressed in the United States' Memorial in the *Case Concerning United States Diplomatic and Consular Staff in Tehran* (henceforth referred to as the *Hostages* Case) that the Court's jurisdiction under Art. I of the Optional Protocol is "clear, simple, and

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> arise, within the scope of article IV of the Optional Protocol concerning the Compulsory Settlement of Disputes, in connexion with the Optional Protocol concerning Acquisition of Nationality.
>
> It is in accordance with the Charter of the United Nations and with the terms and subject to the conditions of the Statute and Rules of the International Court of Justice that the jurisdiction of the Court is hereby recognized.
>
> The Federal Republic of Germany undertakes to comply in good faith with the decisions of the Court and to accept all the obligations of a Member of the United Nations under Article 94 of the Charter."

[48] Consolidated text (including the modification of 18 December 1978) in 859 UNTS, p. XII.

unanswerable".[49] It was in this very case that the United States addressed and rebutted – in a thoroughly convincing manner – several possible arguments against the Court's jurisdiction under the Optional Protocol. This legal reasoning is as valid today as it was almost 20 years ago, particularly as regards the question whether or not the rules laid down in Art. II and III of the Optional Protocol[50] have any impact on the compromissory clause contained in Art. I and the interpretation of the terms "dispute" and "interpretation or application" used in this provision.

3.11 In its Judgment of 24 May 1980 in the *Hostages* Case, the Court fully accepted the arguments put forward by the United States, the then applicant. Although Germany sees no need to reiterate this argumentation at length, it takes the opportunity to recall the opinion shared by the United States and the Court on the relevant issues:

In its Memorial of 12 January 1980, the United States took the view that

> "Articles II and III do not require a two-month waiting period prior to resort to the Court under Article I"[51]

and maintained

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[49] *United States Diplomatic and Consular Staff in Tehran, I.C.J. Pleadings 1980*, p. 144.

[50] These provisions read as follows:

> "Article II:
>
> The parties may agree, within a period of two months after one party has notified its opinion to the other that a dispute exists, to resort not to the International Court of Justice, but to an arbitral tribunal.
>
> Article III:
>
> 1. Within the same period of two months, the parties may agree to adopt a conciliation procedure before resorting to the International Court of Justice.
>
> 2. The conciliation commission shall make its recommendations within five months after its appointment. If its recommendations are not accepted by the parties to the dispute within two months after they have been delivered, either party may bring the dispute before the Court by an application.

[51] *I.C.J. Pleadings 1980, supra* note 49, p. 145.

> "that proceedings in this Court may be unilaterally instituted under Article I of the Optional Protocol *at any time* after a dispute of the appropriate character has arisen."[52]

The United States arrived at this conclusion after a careful analysis of the wording, the purpose, the historical context and the legislative history of the Optional Protocol. Its view was finally confirmed by the Court itself in the following words:

> "The terms of Articles II and III ..., when read in conjunction with those of Article I and with the Preamble to the Protocols, make it crystal clear that they are not to be understood as laying down a precondition of the applicability of the precise and categorical provision contained in Article I establishing the compulsory jurisdiction of the Court in respect of disputes arising out of the interpretation or application of the Vienna Convention in question."[53]

Germany cannot but fully support this understanding of a provision, which was quite aptly characterised by the United States as "truly a model compromissory clause"[54] .

3.12 In the light of such authoritative and unequivocal pronouncements on the part not only of the International Court of Justice but also of the United States Government, Germany is convinced that a somewhat ambiguous observation on the point at issue made by the Agent of the United States in his oral argument in the *Breard* Case[55] was a mere policy statement rather than an indication of a shift in the firm and sound legal position taken by our

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[52] *I.C.J. Pleadings 1980, ibid.*, at p. 149 (emphasis added).

[53] *United States Diplomatic and Consular Staff in Tehran, Judgment*, I.C.J. Reports 1980, p. 25 (para. 48).

[54] *I.C.J. Pleadings 1980, supra* note 49, at p. 142.

[55] "We likewise regret the fact that Paraguay has chosen to disregard the two-month period provided in the Optional Protocol to the Vienna Convention for the possible resolution of such disputes through conciliation or arbitration." *Application of the Vienna Convention on Consular Relations (Paraguay v. United States), Request for the Indication of Provisional Measures*, Oral Argument of 7 April 1998, Uncorrected Verbatim Record, CR 98/7, para. 1.2. (Mr. Andrews).

Adversary on earlier occasions. Such a shift would find no support whatsoever in jurisprudence or in doctrine.

While Germany is fully aware of the *prima facie* nature of findings on jurisdiction and admissibility within a procedure on Provisional Measures, it might still be permitted to point out that the Court itself addressed the recent doubts raised on this point by the Agent of the United States. The Court simply recalled – and thus confirmed – its previous Judgment in the *Hostages* Case.[56] Germany thus considers that both parties to the present dispute concur with each other in the approval of the Court's authoritative statement to the effect that the two months' period referred to in Art. II and III would only come into play when

> "recourse to arbitration or conciliation has been proposed by one of the parties to the dispute and the other has expressed its readiness to consider the proposal."[57]

Obviously, these conditions are not met in the present Case.

Therefore, by bringing the present case before the International Court of Justice on 2 March 1999, Germany has simply exercised its right under the Optional Protocol to institute proceedings unilaterally

> "at any time after a dispute of the appropriate character has arisen"

– to once more follow the wording used by the United States in its written argument in the *Hostages* Case.[58]

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[56] *I.C.J. Reports 1998*, *supra* note 43, at p. 255 (para. 26).

[57] *I.C.J. Reports 1980*, *supra* note 53, at p. 26 (para. 48).

[58] *I.C.J. Pleadings 1980*, *supra* note 49, at p. 149.

IV. Preconditions of the jurisdiction of the International Court of Justice under Article I of the Optional Protocol

3.13 The reference by the United States in its Pleadings in the *Hostages* Case to "a dispute of the appropriate character" points at two preconditions of the Court's jurisdiction under Art. I of the Optional Protocol, namely

a) the existence of a "dispute" and

b) the condition that this dispute must be "arising out of the interpretation or application of the (Vienna) Convention" on Consular Relations.

1. The existence of a "dispute"

a) The meaning of the term "dispute"

3.14 The concept of "dispute" is fundamental for the contentious jurisdiction of the Court. It was already in 1924 in the *Mavrommatis Case* that the Permanent Court coined the classical definition of the term "dispute" frequently used in clauses establishing the jurisdiction of the Court:

> "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[59]

Subject only to minor adjustments,[60] this definition has been constantly applied by both the Permanent Court and its successor, the International Court of Justice. It was recently confirmed in the Judgment of 11 June 1998 on

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[59] *Mavrommatis Palestine Concessions, 1924, P.C.I.J., Series A No. 2*, p. 11. The authoritative French text reads as follows: "Un différend est un désaccord sur un point de droit ou de fait, une contradiction, une opposition de thèses juridiques ou d'intérêts entre deux personnes."

[60] Worth to be mentioned is the replacement of the expression "persons" by the more accurate formulation "parties", *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 99 (para. 22).

Preliminary Objections in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*,[61] where the Court recalled that, in the sense accepted in its jurisprudence and that of its predecessor, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties,[62] and that, in order to establish the existence of a dispute, it must be shown that the claim of one party is positively opposed by the other.[63] The Court went on to say:

> "Whether there exists an international dispute is a matter for objective determination."[64]

3.15 Thus, as the Court already clarified in its Advisory Opinion on the *Interpretation of Peace Treaties* of 30 March 1950,

> "[t]he mere denial of the existence of a dispute does not prove its non-existence. ... [In] a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations ... the Court must conclude that international disputes have arisen."[65]

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[61] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 314 f. (para. 87). See also *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 122 (para. 21) and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 17 (para. 22).

[62] The Court referred to its judgement in *East Timor, I.C.J. Reports 1995*, pp. 99 f. (para. 22) where reference is made to the following earlier decisions: *Mavrommatis Palestine Concessions, 1924, P.C.I.J., Series A, No. 2*, p. 11; *Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 27; and *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 27 (para. 35).

[63] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.

[64] Referring to *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74 and *East Timor*, I.C.J. Reports 1995, pp. 99f. (para. 22).

[65] *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74.

As the United States correctly argued at that occasion, every other position would lead to a result which

> "could only operate to further the purposes of a State not prepared to live according to the law and carry out its responsibilities as a member of the community of nations."[66]

3.16 Furthermore, the Court has made very clear that a party cannot prevent an affirmative answer as to the existence of a dispute by simply not advancing any arguments in favour of its position, whether that party does not participate in the proceedings at all or, although doing so, does not openly admit the existence of a legal or factual controversy with its adversary:

> "where one party to a treaty protests against the behaviour or a decision of another party, and claims that such behaviour or decision constitutes a breach of the treaty, the mere fact that the party accused does not advance any argument to justify its conduct under international law does not prevent the opposing attitudes of the parties from giving rise to a dispute concerning the interpretation or application of the treaty."[67]

3.17 The application of the thus-described set of criteria for the determination of the existence of a dispute prevents the frustration of a commitment to arbitrate or judicially settle in cases where one party is reluctant to admit the existence of a dispute and, by doing so, challenges the jurisdiction of the Court in general. It was precisely the application of these criteria which was vigorously propounded by, and finally worked in favour of, the United States in the *Hostages* Case; a case in which the same jurisdictional basis on which Germany is relying today was invoked by the then applicant.

3.18 Moreover, the position taken by the Court in this respect is so sound and, with regard to the proceedings *in absentia* foreseen in Art. 53 of the Statute, almost self-evident that, notwithstanding frequent discussions about its scope in concrete cases, it has never been challenged in principle. However, due to the position taken by the United States recently in the Hearing on the Request for the Indication of Provisional Measures in the *Breard* Case, where, in a very similar, if not virtually identical, legal context, Counsel for the United States argued that

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[66] *I.C.J. Pleadings, Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, pp. 238 f.

[67] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, I.C.J. Reports 1988*, p. 28 (para. 38).

> "there is no dispute here about either the interpretation or the application of the Convention",[68]

Germany considers it advisable to underline once again the validity of the principles regarding the existence of a dispute.

3.19 Hence, on the basis of the criteria described, there can be no doubt that there does exist "a disagreement on a point of law or fact, a conflict of legal views or interests" and thus a "dispute" within the meaning of Art. I of the Optional Protocol between Germany and the United States on all substantive issues raised by the Applicant in the present proceedings.

b) The individual issues in dispute between the parties

3.20 Subject to a more comprehensive presentation during the discussion on the merits of the case,[69] the points in dispute between the two parties may be enumerated and briefly described as follows:

(1) There exists a "dispute" about the interpretation and application of Article 36 (1) of the Vienna Convention

3.21 Germany contends that in the case of Karl and Walter LaGrand the United States failed to meet its legal obligation under Art. 36 (1) (b), last sentence, of the Convention, to inform the two inmates "without delay" about their right to contact the competent consular post, *i.e.*, the German Consulate General in Los Angeles. Indeed, Karl LaGrand was only given the respective advice on 21 December 1998, that is almost 17 years after his arrest in January 1982.[70]

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[68] *Application of the Vienna Convention on Consular Relations (Paraguay v. United States), Request for the Indication of Provisional Measures*, Oral Argument of 7 April 1998, Uncorrected Verbatim Record, CR 98/7, para 3.10 (Mr. Crook).

This obvious failure to comply with a key provision of the Convention had far-reaching consequences:

a) Since Karl and Walter LaGrand were ignorant of the possibilities open to them under the Convention, they were prevented from invoking their rights enshrined in Art. 36 (1) (a) 2nd sentence and Art. 36 (1) (b) 1st and 2nd sentence, including, in particular, their right to communicate with the German Consulate.

b) Germany itself was deprived of its rights embodied in Art. 36 (1) (a), 1st sentence, and Art. 36 (1) (c) – provisions specifying and concretising the consular functions laid down and recognised in Art. 5 (a), (e) and (i) of the Convention –, namely to establish contact and communicate with their nationals in prison, and in particular its right to arrange for adequate legal representation of the two inmates.

As will be demonstrated later,[71] the ultimate execution of the LaGrand brothers was causally linked to the above-described breaches of the Vienna Convention by the United States.

3.22 Germany thus claims that the United States violated the rights of the Applicant in a twofold way: First, the conduct of the United States impeded Germany from exercising its protective functions spelled out in the said provisions and thus directly violated a treaty-based right of Germany, and second, Germany was injured in the person of its two nationals Karl and Walter LaGrand, whose illegal treatment – with fatal results – it now raises by way of diplomatic

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[69] See *infra* Part Four.

[70] ANNEX 12.

protection. With regard to this latter aspect, it is to be pointed out that both Karl and Walter LaGrand had exhausted all local remedies at their disposal before the present case was brought before the International Court of Justice.

3.23 It is significant that until now the Respondent has not put forward any legal arguments in order to justify its failure to comply with the Vienna Convention on Consular Relations in the present case. Even if in the course of the present proceedings the United States were to arrive at the conclusion that the breach which it committed was so manifest that no justification whatsoever were even arguable – a highly unlikely eventuality –, this admission could not defeat the Court's jurisdiction on the ground of alleged non-existence of a "dispute".

As the then Counsel for the United States in the *Hostages* Case, Mr. Schwebel rightly pointed out, such an argumentation would simply be "specious", because

> "[t]he sum and substance of every case brought to the Court under the compromissory clause of a treaty is the claim that the Respondent's conduct violates its obligations under that treaty. It would be anomalous to hold that the Court has jurisdiction where there is an arguable claim that a treaty has been violated, but lacks jurisdiction where there is a manifestly well-founded claim that the same treaty has been violated. Such a contention has no support in the jurisprudence or traditions of this Court, or in the terms of the Optional Protocols. Indeed, any such rule would provide an incentive for States to flout their treaty obligations and to avoid offering any justification for their conduct in order to defeat the Court's jurisdiction."[72]

This view – which was implicitly followed by the Court[73] – has Germany's full support in the present proceedings.

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[71] See *infra* Part Four, Ch. I. 3. c).

[72] *I.C.J. Pleadings 1980*, *supra* note 49, at p. 279.

[73] *Cf.* the treatment of this question by the International Court in its Judgment in the *Hostages Case*, *supra* note 53, at pp. 24 ff. (paras. 46 ff.).

3.24 Moreover, there do exist several open questions between the Parties, with regard to both matters of law and of fact. These unresolved questions underline the existence of a dispute and deserve clarification within the present proceedings.

3.25 (1) It remains unclear whether or not the United States will argue that at the time of the arrest of the LaGrand brothers, the United States authorities were not aware of the German nationality of Karl and Walter LaGrand and that its conduct was therefore not in breach of Art. 36 (1) (b) of the Convention. Germany, on its part, is convinced – and will show – that the authorities in the United States did know the German nationality of the LaGrand brothers. Thus, on this point we may be faced with a "disagreement on a ... fact" within the meaning of the *Mavrommatis* jurisprudence.

3.26 In the very unlikely case that Germany does not succeed in establishing to the satisfaction of the Court positive knowledge *ab initio* on the part of the responsible officials of the United States of the German nationality of Karl and Walter LaGrand at the time of their arrest, Germany will – in a purely subsidiary and auxiliary manner – argue that the United States nevertheless breached Art. 36 of the Convention because its officials failed to meet the standard of due diligence required under the circumstances: If the Arizona authorities had applied that standard, they would have detected that the brothers LaGrand were – or, at least, could possibly be – German nationals. It would then be for the Court to decide whether or not, and to what extent, Art. 36 of the Convention puts a State under an obligation to apply due diligence in order to establish the nationality of its prisoners, at least in cases in which there exist clear indications that such persons might be foreign nationals. Germany is convinced that, due to the special circumstances of the *LaGrand* Case, the United States was indeed under an obligation to that effect – a legal view which is obviously not shared by its adversary. Thus this question also gives rise to a "dispute" within the established meaning of the term.

3.27 (2) Moreover, Germany holds that Art. 36 (1) of the Convention not only confers rights on Germany itself but grants individual rights to its two nationals Karl and Walter LaGrand as well: rights that are now to be taken up by the State of origin at the international level in the exercise of diplomatic protection. The United States, on the contrary, seems to be of the view that the provision in question does not grant any individual rights at all. Hence, there also exists a dispute on this point.

3.28 (3) Finally, it would be artificial and unsustainable to draw a fine distinction between a dispute about the application and interpretation of Art. 36 (1) itself and a dispute on the question of what remedies are owed for an eventual breach of the obligations embodied in this provision. This latter question – regarding which views undoubtedly differ sharply between the parties – can only be dealt with adequately after a breach of the Vienna Convention on Consular Relations has been ascertained.

3.29 In sum, the present case gives rise to various questions related to Art. 36 (1) of the Convention. Hence, in accordance with the meaning attributed to that term by the established jurisprudence of this Court, other authorities and the unanimous opinion of publicists, there does exist a "dispute" between the Parties on these questions.

(2) There exists a "dispute" about the application and interpretation of Article 36 (2) of the Convention

3.30 Germany holds that the doctrine of procedural default embodied in the municipal law of the United States, as it was applied in the proceedings against Karl and Walter LaGrand, is in violation of Art. 36 (2) of the Convention,[74] which provides that

> "the laws and regulations of the receiving State ... must enable full effect to be given to the purposes for which the rights accorded under this article are intended."

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[74] See in detail *infra* Part Four, Ch. I. 3. b) and c).

Not only did federal courts of the United States consistently and mechanically apply this doctrine in the present Case – with fatal consequences for the brothers LaGrand to be described later –,[75] but officials of the United States executive branch, too, expressed the view that the application of this doctrine would not infringe upon Art. 36 (2) of the Convention.[76] There can be no doubt, therefore, that there exists a dispute between the parties on the question of whether or not the application of certain doctrines or principles of United States domestic law was compatible with Art. 36 (2) of the Convention in the present Case.

(3) There exists a dispute about the legal effect of the Court's Order on Provisional Measures of 3 March 1999 and the consequences arising therefrom

3.31 The German position with regard to the legal effects arising from Orders on Provisional Measures in general and the Court's Order of 3 March 1999 in particular found its expression in a Press Release issued by the German Ministry of Foreign Affairs on 4 March 1999, the day after the execution of Karl LaGrand:

> "The International Court of Justice (ICJ) has rendered a decision binding under international law."[77]

More specifically, on the day before, Germany had argued before the U.S. Supreme Court with regard to the Order of the International Court of Justice of 3 March 1999:

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[75] See *ibid.*

[76] See, e.g., Brief for the United States as *Amicus Curiae* in the Cases of *Paraguay v. Gilmore* and *Breard v. Greene* before the U.S. Supreme Court, 1997 U.S. Briefs 1390, at pp. 40 ff., ANNEX 34.

[77] Original German text: "Der Internationale Gerichtshof (IGH) hat eine völkerrechtlich verbindliche Entscheidung getroffen" (see ANNEX 35).

> "The actions required by the ICJ Ruling are binding upon the United States ... pursuant to Article 94 (1) of the United Nations Charter, a treaty of the United States".[78]

The German Government reiterated this view in very clear terms several weeks later in its reply to a respective interpellation from the German Parliament:

> "The ICJ has not only made a pronouncement of a recommendatory character but rendered a mandatory decision. On 3 March 1999, that is, still before the execution of Walter LaGrand on 4 March 1999, it granted the request of the [German] Federal Government for the indication of Provisional Measures in full, and called on the United States, in a decision taken in accordance with Article 41 of the ICJ Statute in connection with Article 75 of the Rules of Court, as follows:
>
> 'The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings ...'.
>
> As is well known, the United States did not comply with this legally binding decision of the ICJ."[79]

3.32 The opinion expressed in these statements reflects a legal position to which Germany has adhered firmly and consistently. It has also done so on earlier occasions before this Court. For instance, in his oral argument in the *Fisheries Jurisdiction* Case, Agent for Germany pleaded that certain acts of the Government of Iceland were "illegal", *inter alia,* because

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[78] See Memorandum in support of Motion for leave to file a Bill of Complaint and Motion for Preliminary Injunction, ANNEX 27, p. 2.

[79] Original German text: "[D]er IGH [hat] nicht nur eine Verhaltensempfehlung ausgesprochen, sondern eine verbindliche Entscheidung getroffen. Er hat am 3. März 1999, also noch vor der Hinrichtung von Walter LaGrand am 4. März 1999, dem Antrag der Bundesregierung auf Erlaß vorsorglicher Maßnahmen in vollem Umfange stattgegeben und den USA durch Beschluß gemäß Artikel 41 IGH-Statut in Verbindung mit Artikel 75 der Verfahrensordnung des IGH folgendes aufgegeben:

'Die USA haben alle ihr zur Verfügung stehenden Maßnahmen zu ergreifen, um sicherzustellen, daß die Hinrichtung von Walter LaGrand bis zu einer Entscheidung in der Hauptsache nicht vollstreckt wird.'

Bekanntlich sind die USA der verbindlichen Entscheidung des IGH nicht gefolgt." Bundestags-Drucksache Nr. 14/784, see ANNEX 36.

> "these acts intentionally disregard the Court's Order of 17 August 1972, confirmed by Order of 12 July 1973, according to which the Republic of Iceland should refrain from taking any measures against German fishing vessels engaged in fishing activities in the waters around Iceland outside the 12-mile fishery limit during the pendency of the proceedings before the Court."[80]

From this, Germany drew the conclusion – as it will do in the present Case – that, in principle, and subject to a careful analysis of each specific Order, the breach of an Order of the Court brings into operation the ordinary principles of State responsibility as expressed, for example, by the Permanent Court of Justice in 1927 in the *Chorzów Factory* Case[81] and further elaborated since by this Court and other institutions, in particular the International Law Commission.

3.33 Germany therefore maintains – subject to a more detailed presentation below – that

a) an Order of the Court falls within the scope of Art. 94 of the Charter and is thus binding on the addressees, and

b) consequently, a breach of an Order of this Court brings into operation the principles of State responsibility.

3.34 Unfortunately, in view of the conduct of the United States vis-à-vis the Court's Order of 3 March 1999 as well as on previous occasions, the Respondent appears to hold quite a different view regarding the Orders on Provisional Measures of this Court in general, and the specific Order at issue in particular.

3.35 At one occasion, the divergence of views on this point has become manifest even in the present context: In the proceedings initiated by Germany before the U.S. Supreme Court to enforce and give effect to the Court's Order of 3 March 1999, the United States Solicitor General took the view that

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[80] *I.C.J. Pleadings 1972, Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, p. 347.

> "an Order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief."[82]

In sharp contrast to this, Germany, in its complaint initiating the proceedings before the Supreme Court, had argued that

> "The ICJ Ruling will be violated if the United States does not ensure that a national of Germany, Walter LaGrand ... is not executed ...".[83]

3.36 To further illuminate the existence of a dispute on this point, it is to be recalled that the Governor of Arizona, Jane D. Hull, chose to simply disregard the Court's Order without even considering the possibility that any legal effects might arise from this ruling of the principal judicial organ of the United Nations. Possibly, in doing so, the Arizona Governor let herself be inspired by the views expressed by the Department of State in its *amicus curiae* brief to the Supreme Court in the *Breard* Case, in which it asserted:

> "The better reasoned position is that such an order is not binding."[84]

In the same case, in her letter to the Governor of Virginia of 13 April 1998, Secretary of State Albright characterised the Order of the Court of 9 April 1998 – containing a text virtually identical to that of 3 March 1999 – as "non-binding".[85]

3.37 Neither did the United States Federal Government take any steps to enforce the ruling of the International Court of Justice in the *LaGrand* Case. This was openly admitted by Mr. Foley at a Press Conference of the US State Department on 3 March 1999:

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[81] *Factory at Chorzów, Merits, 1928, P.C.I.J., Series A, No. 17*, p. 47.

[82] ANNEX 28.

[83] German Complaint, ANNEX 27, p. 2.

[84] ANNEX 34, at p. 49.

[85] ANNEX 37.

> "Question: Does the State Department take a position, other than simply transmitting the documents?
>
> Mr. Foley: No, we have not. We simply transmitted the documents."[86]

3.38 In sum, there does exist a fundamental dispute between the parties on the question whether and to what extent binding effect can be attributed to the Orders of the Court on Provisional Measures.

(4) There exists a "dispute" with regard to the remedies owed for the violation on the part of the United States of its international legal obligations

3.39 There also exists a dispute between the parties with regard to the remedies owed for the violation of both the aforementioned provisions of the Vienna Convention on Consular Relations and the Court's Order of 3 March 1999.

3.40 Whereas Germany holds that the ordinary principles of State responsibility must apply in the present case, the United States seems to be of the opinion that the consequences arising from a violation of these international legal obligations are very limited, if such consequences do exist at all.[87]

3.41 If one takes the view – as the United States apparently does – that Orders of the International Court of Justice indicating Provisional Measures do not create legal obligations, it is only consistent to further hold that disregard for these Orders cannot entail responsibility.[88] This view, however, is not shared by Germany.

3.42 With regard to the violations of the Convention itself, the United States has not offered Germany any remedy for its wrongful conduct. In light of its conduct in the *Breard* Case, it does not seem that the United States is willing to accept that a breach of the legal obligations at stake in the present case obliges it to any reaction. Germany, on its part, maintains that in principle the whole range of remedies available under the international law of State responsibility also applies to the particular violations which occurred in the *LaGrand* Case.[89]

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[86] ANNEX 38.

[87] See *infra* note 481 and accompanying text.

[88] See *infra*, Part IV, Ch. III. 4. a).

2. The existence of a dispute "arising out of the interpretation or application of the [Vienna] Convention" on Consular Relations

a) Introductory remarks

3.43 By using the formula "arising out of the interpretation or application", Art. I of the Optional Protocol employs a rather classical wording: Not only had this formula already been used in many similar jurisdictional clauses, it also follows *verbatim* the text of a model clause adopted by the Institut de Droit International in 1956.[90] Commenting on the (envisaged) jurisdictional clause, the initiator and rapporteur of the respective Commission of the Institut, the late Professor Guggenheim, could thus rightly state:

> "Cette formule – qui couvre toute la gamme des différends juridiques possibles au sujet d'une Convention ou d'une Résolution – étant devenue d'un usage généralisé dans les clauses des actes prévoyant la juridiction de la Cour, il n'y a aucune raison d'en faire abstraction dans la clause modèle."[91]

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[89] See in detail *infra* Part Six.

[90] 46 *Annuaire de l'Institut de Droit international* (1956), p. 360: "Tout différend relatif à l'interprétation ou à l'application de la présente convention relèvera de la compétence obligatoire de la Cour internationale de Justice qui, à ce titre, pourra être saisie par requête de toute Partie au différend." The direct impact of this recommendation on the drafting of the Optional Protocol is described in detail by H. Briggs, The Optional Protocols of Geneva (1958) and Vienna (1961, 1963) concerning the Compulsory Settlement of Disputes, in: *Recueil d'études de droit international en hommage à Paul Guggenheim* (1968), pp. 628 ff.

[91] 44 *Annuaire de l'Institut de Droit international* (1952), p. 461.

In attributing such a wide scope to the formula ("toute la gamme des différends juridiques possibles"), Professor Guggenheim relied on the authority of the Permanent Court of International Justice, which had advocated a broad understanding of the term "application" in two judgments delivered in 1925 and 1927 respectively.[92] In the *Chorzów Factory* Case, confirming the formula developed in the *Mavrommatis* Case,[93] and after expressly rejecting a strictly literal meaning of the word "application" in a jurisdictional clause virtually identical with the one embodied in the Optional Protocol, the Court stated in its Judgment of 26 July 1927 that

> "'[A]pplication' is a wider, more elastic and less rigid term than 'execution', but also that 'execution ... is a form of application'."[94]

Giving special emphasis to the intentions of the parties, and thus confirming the basic rule that the very purpose of interpretation is to ascertain such intention from a text[95] – a rule which has now found its expression in Article 31 (1) of the Vienna Convention on the Law of Treaties – , the Court further argued:

> "For the interpretation of [the jurisdictional clause], account must be taken ... also and more especially of the function which, in the intention of the contracting Parties, is to be attributed to this provision."[96]

3.44 In order to clarify such intention in the present case, Germany does not have to rely on remote, ambivalent and contradictory sources. Rather, these intentions find their unequivocal expression in the text of the Optional Protocol itself, whose Preamble provides:

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[92] *Mavrommatis Jerusalem Concessions, 1925, P.C.I.J., Series A No. 5* and *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9.*

[93] *Mavrommatis, supra* note 92, at p. 48.

[94] *Chorzów Factory, supra* note 92, at p. 24.

[95] See, *e.g.*, P. Reuter, *Introduction to the Law of Treaties* (2nd ed. 1995), p. 96.

[96] *Chorzów Factory, supra* note 92, at p. 24.

> "The States Parties to the present Protocol and to the Vienna Convention on Consular Relations ...
>
> Expressing their wish to resort in *all matters* concerning them *in respect of any* dispute *arising out of* the interpretation or application of the Convention to the compulsory jurisdiction of the International Court of Justice ..." (emphasis added).

The relevance of the preamble for the purpose of interpreting the legal instrument of which it is an integral part – in particular with regard to the ascertainment of the intentions of the parties that led to the conclusion of the treaty – is generally accepted.[97] Thus, in order to determine the legal purport of the operative provisions of a treaty, the preamble plays an important role both as a tool of systematic ("context" within the meaning of Article 31 [2] of the Vienna Convention on the Law of Treaties) as well as of teleological interpretation (Article 31 [1] of the Vienna Convention).

3.45 The wording of the Preamble to the Optional Protocol illuminates the comprehensive scope of disputes that the parties intended to bring within the jurisdiction of the Court. In this respect the Preamble confirms the text of Art. I of the Optional Protocol itself. A careful reading of the Memorial of the United States in the *Hostages Case* has led Germany to conclude that this assessment is shared by the Respondent in the present proceedings.[98]

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[97] See, *e.g.*, the very comprehensive presentation by P. You, *Le préambule des traités internationaux* (1941); exactly on the point in question here see also P. You, L'interprétation des traités et le rôle du préambule des traités dans cette interprétation, 20 *Revue de Droit International* (1942), pp. 25 ff. Cf. also J. Corriente Cordoba, Valoración jurídica de los preámbulos de los tratados internacionales (1973); G. Fitzmaurice, The Law and Procedure of the International Court of Justice 1951-54: Treaty Interpretation and other Treaty Points, 33 *British Yearbook of International Law* (1957), pp. 227 ff.; I. Sinclair, *The Vienna Convention on the Law of Treaties* (2d ed. 1984), pp. 127 ff.; H. Köck, *Vertragsinterpretation und Vertragsrechtskonvention*, p. 30 Fn. 63 (with references to international jurisprudence). See also in detail already J. Basdevant, La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités, 15 *Recueil des Cours* (1926-V), pp. 563 ff.

[98] See in particular *I.C.J. Pleadings* 1980, *supra* note 49, at pp. 142 ff.

b) The dispute concerning Article 36 (1) and Article 36 (2) of the Convention

3.46 (1) Germany claims, first, that the United States violated the Vienna Convention by failing to provide its nationals, Karl and Walter LaGrand, with the notice required by Art. 36 (1) (b), last sentence, of the Convention, according to which

> "[t]he said authorities [*i.e.*, those of the receiving State] shall inform the person concerned without delay of its rights under this sub-paragraph".

3.47 By violating this provision in the case of the LaGrand brothers, the authorities of the United States prevented Germany from exercising its rights under Art.36 (1) (a) and (c) of the Convention, namely its freedom

> "to communicate with nationals of the sending State and to have access to them" (Art. 36 [1] [a] Vienna Convention)

and the various rights conferred upon the sending State *vis-à-vis* its nationals in prison, custody or detention as provided for in Art. 36 (1) (b) of the Convention, including the right

> "to visit, ... to converse and correspond with him and to arrange for his legal representation."

3.48 Additionally, by not providing the required notice to the two detainees, the United States violated Art. 36 (1) (a), 2nd sentence, of the Convention, where it is stated that

> "[n]ationals of the sending State have the same freedom with respect to communication with and access to consular officers of the sending State."

Germany raises this point as a matter of diplomatic protection on behalf of Walter and Karl LaGrand.

It is beyond reasonable doubt that all these issues are questions relating to the interpretation and application of the Vienna Convention and thus fall within the scope of Art. I of the Optional Protocol.

3.49 (2) Germany's second claim relates to the question of whether or not the laws and regulations of the United States available to implement the provisions laid down in Art. 36 (1) of the Convention are sufficient in view of Art. 36 (2) of the Convention, according to which such laws and regulations

> "must enable full effect to be given to the purposes for which the rights accorded under this Article are intended".

Germany claims that, by applying the rule of procedural default in a mechanical manner to the case of the LaGrands, the United States has violated Art. 36 (2) of the Vienna Convention by preventing the effective exercise of the right to consular assistance after the jury trial and the sentencing phase have been concluded. This issue is clearly a dispute on the interpretation and application of the Vienna Convention and, as such, falls within the scope of Art. I of the Optional Protocol.

3.50 Germany therefore submits that, since both claims arise out of the interpretation and application of the Convention, the Court has jurisdiction to hear them.

c) Remedies owed for the violation of the Vienna Convention falling within the scope of Article I of the Optional Protocol

3.51 In the *Breard* Case the United States argued that the question of the remedies pursued by Paraguay did not lead to a dispute "about the interpretation or application of the Vienna Convention because "the Vienna Convention does not provide for such an extraordinary form of relief."[99]

However, this allegation was rejected by the Court in its Order of 9 April 1998 which held that

> "there exists a dispute as to whether the relief sought by Paraguay is a remedy available under the Vienna Convention, in particular in relation to Article 5 and 36 thereof; and ... this is a dispute arising out of the application of the Convention within the meaning of

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[99] *Application of the Vienna Convention on Consular Relations (Paraguay v. United States), Request for the Indication of Provisional Measures*, Oral Argument of 7 April 1998, Uncorrected Verbatim Record, CR 98/7, para. 311 (Mr. Crook).

> Article I of the Optional Protocol concerning the Compulsory Settlement of Disputes of 24 April 1963."[100]

By this statement the Court referred to its established jurisprudence according to which

> "[d]ifferences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application."[101]

3.52 Moreover, less than two months before the oral hearings in the *Breard* Case, the Court had rejected a similar objection with regard to its jurisdiction raised by the United Kingdom and the United States in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie.* There, the parties differed, *inter alia*, on the question of whether or not the incident at Lockerbie was governed by the Montreal Convention, the only legal instrument providing a jurisdictional basis for the Court to decide on the merits of the case. The Court held:

> "A dispute thus exists between the Parties as to the legal régime applicable to this event. Such a dispute, in the view of the Court, concerns the interpretation and application of the Montreal Convention, and, in accordance with Article 14, paragraph 1, of the Convention, falls to be decided by the Court."[102]

3.53 Thus, the Court's unequivocal position may be summarised as follows:

(a) a dispute whether or not the violation of a provision of the Vienna Convention gives rise to a certain remedy is a dispute concerning "the application and interpretation" of the aforesaid Convention, and thus falls within the scope of Art. I of the Optional Protocol and,

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[100] *I.C.J. Reports 1998, supra* note 43, p. 256 (para. 31).

[101] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 142 (para. 283) recalling the finding of the Permanent Court of International Justice in *Chorzów Factory, supra* note 92, p. 21.

[102] *ICJ Reports 1998, supra* note 61, at p. 18 (para. 259) and at p. 123 (para. 24).

(b) in more general terms, a jurisdictional clause providing for the jurisdiction of this Court in disputes concerning the "interpretation and application" of a specific "legal régime" covers the question whether or not this very legal régime is applicable or not in a given case.[103]

3.54 If these criteria are applied to the present dispute over the remedies owed for a breach of certain provisions of the Vienna Convention, there can be no doubt that this question falls within the scope of Art. I of the Optional Protocol. Even if the United States were to take the view that the Vienna Convention constituted a sort of "self-contained régime" – an assertion which Germany contests –, the answer would be the same because the subject-matter of the question is a dispute regarding the interpretation and application of the Vienna Convention within the meaning which the established jurisprudence of this Court has attributed to this and other virtually identical jurisdictional clauses.

d) The dispute concerning the conduct of the United States vis-à-vis the Court's Order of 3 March 1999

3.55 Germany brought the present Case before the International Court in order to have its rights under the Vienna Convention enforced. The Court issued its Order of 3 March 1999 precisely in order to preserve those rights pending its decision on the merits. The Court stated that it would

> "not order interim measures in the absence of 'irreparable prejudice ... to rights which are the subject of dispute ...'"[104]

and that

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[103] See already the Permanent Court of International Justice in its Judgment of 25 August 1925 in *Certain German Interests in Polish Upper Silesia, Jurisdiction, 1925, P.C.I.J., Series A, No. 6*, p. 16: "It follows that the differences of opinion contemplated by Article 23 [jurisdictional clause which provided for the competence of the Court in cases "résultant de l'interprétation et de l'application" of a certain treaty] ... may also include differences of opinion as to the extent of the sphere of application ..." (recalled in *Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9*, pp. 20 f.).

[104] *LaGrand (Germany v. United States of America), Provisional Measures, Order of 3*

> "the execution of Walter LaGrand ... would cause irreparable harm to the rights claimed by Germany in this particular case".[105]

It is certainly true – as Paraguay put it in the *Breard* Case – that

> "[t]he Order therefore constituted the Court's provisional 'interpretation and application' of the Convention."[106]

3.56 With due regard to the wording of Article I of the Optional Protocol in conjunction with the intentions of the parties as expressed in its Preamble, there can be no reasonable doubt that the dispute between the parties on the question of whether the United States were obliged to comply and did comply with the Order, is therefore a dispute

> "*arising out of* the interpretation or application of the Convention" (emphasis added),

and thus a dispute falling within the jurisdiction of the Court as established in Article I of the Optional Protocol. It is to be stressed once again that

> "[t]he primacy of the text, especially in international law, is the cardinal rule for any interpretation."[107]

Thus, with due regard to the ordinary meaning of the text of the Optional Protocol, including its Preamble, and the aims and purposes attributed to this legal instrument by the parties themselves, Germany holds that the dispute relating to the non-compliance of the United States with the Court's Order of 3 March 1999 is covered by the jurisdictional clause in Article I of the Optional Protocol.

3.57 Questions relating to the non-compliance with a decision of the Court under Article 41 para. 1 of the Statute, *e.g.* Provisional Measures, are an integral component of the entire original dispute between the parties. This was already

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March 1999, I.C.J. Reports 1999, para. 23, referring to earlier decisions.

[105] *Ibid.*, para. 24.

[106] *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, Memorial of the Republic of Paraguay (9 October 1998), p. 28 (para. 3.19).

[107] P. Reuter, *Introduction to the Law of Treaties* (2d ed. 1995), p. 96.

confirmed by the Permanent Court of International Justice in its Order of 5 December 1939 where the Court stated

> "*the parties to a case* must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend *the dispute*."[108]

3.58 The same line of reasoning – although developed in a much more detailed and explicit manner – was followed in the Judgments of the International Court of Justice in the *Fisheries Jurisdiction* Cases (1972-1974) brought by the United Kingdom and the Federal Republic of Germany against Iceland.

There, Germany expressly included in its submissions certain post-application actions by Iceland – *e.g.* the forcible interference with German-registered fishing vessels by Icelandic coastal patrol boats – which had taken place after the Court had issued Orders on Provisional Measures calling upon Iceland to refrain from actions to aggravate or extend the dispute over fishing rights in waters surrounding the island.[109]

In its Judgment of 25 July 1974 on the merits of the case, the Court held that it had jurisdiction to consider this claim since

> "[t]he matter raised therein is part of the controversy between the Parties, and constitutes a dispute relating to Iceland's extension of its fisheries jurisdiction. The submission is one based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of that Application. As such it falls within the scope of the Court's jurisdiction defined in the compromissory clause of the Exchange of Notes of 19 July 1961 [the instrument conferring jurisdiction]."[110]

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[108] *Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J., Series A/B, No. 79*, p. 199 (emphasis added).

[109] *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 30; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Interim Protection, Order of 12 July 1973, I.C.J. Reports 1973*, p. 313.

[110] *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 203 (para. 72)

Earlier in the same Judgment, and in a wider context, the Court had already explained the reasons for the rather broad scope it was willing to attribute to its jurisdiction in this case.[111] It started by saying that

> "[t]he present dispute was occasioned by Iceland's unilateral extension of its fisheries jurisdiction. However, it would be too narrow an interpretation of the compromissory clause to conclude that the Court's jurisdiction is limited to [this question]."[112]

And the Court went on to explain that

> "[f]urthermore, the dispute before the Court must be considered in all its aspects. ... Consequently, the suggested restriction on the Court's competence not only cannot be read into the terms of the compromissory clause, but would unduly encroach upon the power of the Court to take into consideration all relevant elements in administering justice between the Parties."[113]

These principles can and should be applied, *mutatis mutandis*, to the present Case. Indeed, the similarities in the *Fisheries* Cases and in the present Case with regard both to the legal as well as to the factual setting are striking:

3.59 In the present Case the dispute was, in the Court's own words, "occasioned" by the United States' failure to comply with certain provisions of the Vienna Convention. However, in order to consider the dispute "in all its aspects", it would "be too narrow an interpretation of the compromissory clause to conclude that the Court's jurisdiction is limited to"[114] this question. The submission relating to the non-compliance on the part of the United States with the Court's Order of 3 March 1999 "is one based on facts subsequent to the filing of the Application, but arising directly out of the question which is the subject-matter of that Application." Restrictions on the Court's competence with regard to this question "not only cannot be read into the terms of the compromissory clause", that is, in the present Case, Article I of the Optional Protocol, "but would unduly encroach upon the power of the Court to take into consideration all relevant elements in administering justice between the Parties."[115] Indeed, the taking into account of the conduct of the United States vis-à-vis the Court's Order of 3 March 1999 is certainly an essential element in the settlement of the present dispute by judicial means, and thus in the administration of justice within the meaning attributed to this expression in the *Fisheries* Case.

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[111] The following presentation confines itself to the quotation of the relevant passages from the Judgment in Germany v. Iceland. However, the statements of this Court cited in the following are also to be found – in identical terms – in the Judgment on the respective dispute between the United Kingdom and Iceland (*ibid.*, 21 f.).

[112] *Ibid.*, p. 190 (para. 39).

[113] *Ibid.*, para. 40.

3.60 Finally, Germany holds that the Court has jurisdiction over the dispute with respect to the Order also by virtue of its inherent jurisdiction. As the International Court of Justice has explained in the *Nuclear Tests* Cases

> "[s]uch inherent jurisdiction ... derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded."[116]

The Court described the purpose and scope of its authority – emanating directly from its status as a court of justice – as follows:

> "[T]he Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the 'inherent limitations on the exercise of the judicial function' of the Court, and to 'maintain its judicial character (*Northern Cameroon, Judgment, I.C.J. Reports 1963*, at p. 29)'."[117]

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[114] *Ibid.*

[115] *Ibid.*

[116] *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, pp. 259 f. (para. 23).

[117] *Ibid.* See also Rosenne, *supra* note 45, p. 602: "In addition to that 'mainline' or 'merits' jurisdiction and the related incidental jurisdiction, the Court possesses inherent jurisdiction to control all aspects of the proceedings themselves."

The question of whether or not an Order of the Court on Provisional Measures – issued in a specific case pending before the Court – has been violated or not by one of the parties, undoubtedly falls within the scope of the inherent jurisdiction of the Court thus described.

3. Conclusion

3.61 In sum, there exists a "dispute", within the meaning given to this term by uniform jurisprudence and scholarly opinion, with regard to all issues raised in the present proceedings. This dispute arises out of the interpretation and application of the Vienna Convention on Consular Relations and thus falls within the scope of Art. I of the Optional Protocol. It is therefore respectfully submitted that the Court is competent to hear all claims brought by the Federal Republic of Germany.

V. The admissibility of the claims brought by Germany

3.62 A comprehensive analysis of the applicable legal instruments, of the relevant caselaw and the pertinent writings of publicists has indicated nothing that could give rise to any doubts with regard to the admissibility of the present application. Therefore, Germany holds that the application which it lodged on 2 March 1999 as well as each and every claim comprised therein is admissible. No developments since then have rendered the application inadmissible in whole or in part.

Although the burden to prove the contrary falls fully within the responsibility of the Respondent in the present case, Germany – for the reasons set out at the very beginning of this part of its Memorial – avails itself of the opportunity to briefly address the issues of the timing of its application as well as the argument of mootness.[118] Furthermore, in the context of admissibility, Germany will deal with the question of the nationality of Karl and Walter LaGrand which might be regarded as having a direct impact on the *ius standi* of Germany before this Court.[119]

1. The timing of the German Application

3.63 Considering certain reproaches regarding Germany's timing of its application,[120] the Court's attention is drawn to the fact that the applicable treaty provisions do not provide for any specific time-limit or moment in time at which an application is to be brought before the Court.

3.64 Germany is fully aware that – even in the absence of any such provision –

> "delay on the part of a claimant State may render an application inadmissible",

as this Court has stated in its Judgment of 26 June 1992 in the case concerning *Certain Phosphate Lands in Nauru.*[121] At the same occasion, the Court went on to specify:

> "[I]nternational law does not lay down any specific time-limit in that regard. It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible."[122]

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[118] See *infra* 1. and 2.

[119] See *infra* 3. Since nationality is also a constituent element of Art. 36 of the Vienna Convention itself, the existence of this legal bond also constitutes a basic condition of the assumption of a breach of a treaty obligation on the part of the United States vis-à-vis Germany.

[120] *Cf.* the letter of the Solicitor General to the U.S. Supreme Court, ANNEX 28.

[121] *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 253 (para. 32).

[122] *Ibid.*, at pp. 253 f. (para. 32).

The subject-matter of the *Nauru* Case was the question of the rehabilitation of phosphate land worked out before 1 July 1967 by Australia. The acts allegedly constituting a breach of an international obligation had been completed before, and did not extend beyond, that day. A claim as to rehabilitation was raised by the Nauruan Government on 31 January 1968 and rebutted by the Australian Government on 4 February 1969. As the Court pointed out, it was on this latter day at the latest that

> "Nauru was officially informed ... of the position of Australia on the subject of rehabilitation of the phosphate land".[123]

Thus, it was at this very moment that the opposing claims with regard both to the facts and to the law governing the dispute were ultimately formulated and made known to the parties. From this date, it took Nauru more than 20 years to resolve to bring the dispute to the International Court. But this circumstance did not prevent the Court from holding that

> "Nauru's Application was not rendered inadmissible by passage of time".[124]

Considering such recent jurisprudence of the Court, it seems to be beyond reasonable doubt that "passage of time" cannot constitute a bar to the admissibility of the claims raised by Germany in the present case.

3.65 This is even more obvious if one takes into account the differences between the legal and factual situations involved in the two cases:

First of all, it was only seven days before it brought the dispute to the Court that Germany had become aware of all the relevant facts underlying its claim.[125] These seven days were not only needed for the preparation of the Application but were equally used for intensive diplomatic and political activities at all levels.

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[123] *Ibid.*, at p. 254 (para. 36).

[124] *Ibid.*, at pp. 254 f. (para. 36).

[125] See *supra* Part Two (Statement of Facts).

Second, Germany only became aware of the imprisonment and the death sentence against its two nationals at the end of the year 1992, by mere coincidence and in particular without any active assistance by the United States.[126] Germany immediately engaged in a variety of activities at the diplomatic and consular level in order to help to minimise the consequences which had arisen from the United States' breach of obligations under the Vienna Convention on Consular Relations. In so doing, Germany, until 23 February 1999, the date on which it became apparent that the Arizona authorities had been fully aware of the German nationality of Karl and Walter LaGrand from the beginning, chose to pursue the avenue of moral and political appeals rather than a strictly legal approach. These appeals were carried out assiduously, as described in Part Two of the present Memorial (Statement of Facts).

Germany decided in favour of this alternative because it did not want its steps to negatively affect the efforts to save the LaGrand brothers from execution. Thus, several motions with the aim of reversing the death sentences pronounced against the brothers were pending before U.S. courts. Germany was determined to avoid any impression that it was interfering in these proceedings.

Germany had full confidence that U.S. courts would ultimately rectify the obvious violations of international law involved. Besides, Karl LaGrand was the first German citizen sentenced to death and actually executed in the United States since the creation of the Federal Republic of Germany. The first and only experience Germany had hitherto had in this regard was the case of Jens Soering[127] in the 1980's, in which a death sentence could finally be avoided. It was only after the shocking revelation on 23 February 1999 by State Attorney Peasley that the authorities of the State of Arizona had been aware since 1982 that Karl and Walter LaGrand were German nationals, that Germany felt compelled to change its course and decided to bring the case before the International Court of Justice.

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[126] See *supra* Part Two, para. 2.06.

[127] See for the factual and legal background of this case, inter alia, R. Lillich, The Soering Case, 85 *American Journal of International Law* (1991), pp. 128 ff. and J. Quigley/S. Shank, Death Row as a Violation of Human Rights: Is it Illegal to Extradite to Virginia?, 30 *Virginia Journal of International Law* (1990), pp. 24 ff. On subsequent developments – in particular the assurance on the part of the United States that Soering

3.66 Under these circumstances, the timing of the German application cannot raise any doubts as to admissibility. Neither did it lead to a trial by ambush. On the contrary, respect towards both this Court and the Respondent commands that a State take the step towards settlement by the principal judicial organ of the United Nations only after having carefully weighed all alternatives and having duly considered the legal and factual problems of the case as well as the political implications to which such an Application may give rise.

Germany thus chose to bring this case to the Court only after having

a) become aware of all relevant facts,

b) thoroughly examined the pertinent law in order to ensure a sound legal argumentation,

c) considered and exhausted the appropriate alternatives, and finally

d) carefully weighed the political implications of such a step.

3.67 Furthermore, an essential part of the German claim relates to the question of the consequences arising from the breach of the Court's Order of 3 March 1999 indicating Provisional Measures, a question to which considerations as to "passage of time" obviously cannot apply.

3.68 Third, Germany would like to draw the attention of the Court to a statement in its Judgment of 11 June 1998 on Preliminary Objections in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon*

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would not face the death penalty if extradited – see R. Steinhardt, Recent Developments in the Soering Litigation, 11 *Human Rights Law Journal* (1990), pp. 453 ff.

v. Nigeria). There, a Nigerian submission to the effect that Cameroon's application had not been brought before the Court in "due time" and that this circumstance was to be seen as a violation of the principle of good faith, was rebutted by the Court in the following words:

> "The Court observes that the principle of good faith is a well-established principle of international law. ...
>
> The Court furthermore notes that although the principle of good faith is 'one of the basic principles governing the creation and performance of legal obligations . . . it is not in itself a source of obligation where none would otherwise exist' (*Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 105, para. 94). There is no specific obligation in international law for States to inform other States parties to the Statute that they intend to subscribe or have subscribed to the Optional Clause. Consequently, Cameroon was not bound to inform Nigeria that it intended to subscribe or had subscribed to the Optional Clause.
>
> Moreover:
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> A State accepting the jurisdiction of the Court must expect that an Application may be filed against it before the Court by a new declarant State on the same day on which that State deposits with the Secretary-General its Declaration of Acceptance. (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 146.)
>
> Thus, Cameroon was not bound to inform Nigeria of its intention to bring proceedings before the Court. In the absence of any such obligations and of any infringement of Nigeria's corresponding rights, Nigeria may not justifiably rely upon the principle of good faith in support of its submissions."[128]

The same holds true – *mutatis mutandis* – in the present Case: Since the applicable jurisdictional basis, Art. I of the Optional Protocol, does not provide for any temporal limitations or restrictions of any other kind, the principle of good faith in itself can in no way limit Germany's discretion in this respect.

3.69 Finally, it is to be repeated once again that Germany has been active at all political and diplomatic levels imaginable before bringing the present dispute before the International Court of Justice – a step taken after due and careful deliberation. Germany drew attention to this circumstance in its argument before the U. S. Supreme Court in the immediate aftermath of this Court's Order of 3 March 1999 and just hours before Walter LaGrand was executed:

> "As this Court will appreciate, it is not a small step for a sovereign state and close ally of the United States to bring proceedings against the United States ... in the ICJ ... ."[129]

2. The German application has not become moot due to subsequent developments

3.70 On several occasions in the past, the Court has found that certain events subsequent to the filing of an application may

> "'render an application without object' and 'therefore the Court is not called upon to give a decision thereon'".[130]

In the present Case, the only line of reasoning fitting into this pattern would be the assumption that the execution of Walter LaGrand could have deprived the present application of its object. From the viewpoint of domestic criminal procedure it is certainly true that

> "if the condemned man's sentence is executed, the matter is terminated and becomes, in the Anglo-Saxon parlance, 'moot'. The *international* incorrectness of the situation, however, is not mooted."[131]

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[128] *I.C.J. Reports 1998*, *supra* note 61, pp. 296 f. (paras. 38 f.).

[129] Memorandum, ANNEX 27, pp. 3 f.

[130] *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), ICJ Reports 1998*, p. 26 (para. 46) referring to *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 95 (para. 66); *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974*, p. 272 (para. 62) and *Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 38.

[131] K. Highet, The Emperor's New Clothes: Death Row Appeals to the World Court? The Breard Case As a Miscarriage of (International) Justice, in: *In Memoriam Judge José Maria Ruda*, manuscript, pp. 14 f. (emphasis added, footnotes omitted), ANNEX 39.

Holding otherwise would wholly misinterpret the object and purpose of the present Application. The present Case – to emphasise this once again – deals with a specific and ongoing dispute on the application and interpretation of the Vienna Convention on Consular Relations, on the remedies available to Germany for violations of certain of its provisions, and on the legal consequences arising from the non-observance of the Court's Order of 3 March 1999. It is obvious that none of these issues have lost their relevance following the execution of Walter LaGrand.[132]

3.71 A comparison with the *Nuclear Tests* Case affirms this finding. In this case, the Australian Government had requested the Court to adjudge and declare that

> "the carrying out of *further* atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law."[133]

When France later unilaterally entered into a binding commitment to cease further atmospheric nuclear testing, it was indeed arguable that the Australian claim thereby lost its object.

3.72 One of Germany's claims in the present Case is for the Court to adjudge and declare that

> "the United States should provide Germany a guarantee of the non-repetition of the illegal acts."[134]

Since such a guarantee – binding under international law – has not yet been given, there still exists a difference between Germany's submissions in its Application and in the present Memorial on the one hand and the factual and legal reality on the other, even considering developments subsequent to the filing of the application. The same is true for all other claims which Germany has asked the Court to decide upon. Germany is convinced that the question of "mootness" as a bar to the admissibility of a case could – if at all – only come into play after subsequent developments have led to a complete congruity between the Applicant's claims and the reality, both in law and in fact. This, however, is obviously not the case.

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[132] One consequence was, of course, that Germany had to adapt and alter one of its submissions which was indeed affected by the execution, due to the very nature of the death penalty.

[133] *I.C.J. Reports 1974*, *supra* note 116, p. 256 (para. 11) (emphasis added).

[134] Application, Paragraph 15.

3. The nationality of Karl and Walter LaGrand

3.73 Immediately after the German Consulate General in Los Angeles had learned about the imprisonment of Walter and Karl LaGrand, that is, in June 1992, it engaged in a careful and comprehensive inquiry into the nationality status of the two brothers. In collaboration with the competent administrative bodies in the Federal Republic of Germany the following facts with regard to their nationality were established:

Walter Bernhard and Karlheinz LaGrand were born on 26 January 1962 in Dillingen/Germany, and on 10 October 1963 in Augsburg/Germany respectively, as sons out-of-wedlock of Emma Magdalena Gebel, a German national.[135] At the time of birth of the two brothers the pertinent provision of the German law on nationality – the *Reichs- und Staatsangehörigkeitsgesetz* of 1913 – provided in its § 4 (1), first sentence:

> "Upon birth, the child of a German [father] born in wedlock acquires the nationality of the father, a child of a German [mother] born out of wedlock acquires the nationality of the mother."[136]

It was by virtue of this provision that Karl and Walter LaGrand became German nationals by origin. This was certified on 15 March 1993 through the issuance of "certificates of citizenship" for both brothers by the competent authority, in this case, the *Landrat des Wetteraukreises in Friedberg*.[137] Just for the sake of completeness it might be added that acquisition of nationality by virtue of the *ius sanguinis* principle – as expressed in § 4 (1) RuStAG[138] – is a social fact which constitutes a genuine connection/link between an individual and the country of origin within the meaning that this term has been given in the jurisprudence of this Court.[139] As Judge Rezek rightly put it:

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[135] See copies of the certificates of birth of the brothers as well as of the passport of their mother, Ms. Emma M. Gebel, in ANNEX 40.

[136] "Durch Geburt erwirbt das eheliche Kind eines Deutschen die Staatsangehörigkeit des Vaters, das uneheliche Kind einer Deutschen die Staatsangehörigkeit der Mutter"; cf.

> "Sur le plan des relations internationales, il est également certain que l'attribution de nationalité *jure sanguinis*, ayant pour base la nationalité parentale, n'a pas fait l'objet de contestations manifestes … "[140]

Consequently, it has never been contested that a nationality based on this principle provides the State which has granted it a title to the exercise of diplomatic protection and to the institution of international judicial proceedings.

3.74 The German nationality of the two brothers was not affected by any subsequent events, *i.e.* in particular neither by their moving to the United States nor by their adoption by Mr. Masie LaGrand. According to the applicable rules of the German law on nationality, neither of these circumstances lead to the loss of German nationality. Thus, Karl and Walter LaGrand never lost their German nationality; they were German nationals from their birth until their death.

A. Makarov, *Deutsches Staatsangehörigkeitsrecht. Kommentar* (1966), p. 43.

[137] ANNEX 41.

[138] See, *e.g.*, Makarov, *supra* note 136, p. 43: "Der § 4 des Reichs- und Staatsangehörigkeitsgesetzes bildet eine der Grundlagen des deutschen Staatsangehörigkeitsrechts, indem er das reine jus sanguinis-Prinzip proklamiert." [§ 4 of the RuStAG, being based on the pure *jus sanguinis* principle, is one of the pillars of the German law of nationality].

[139] See in particular *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, pp. 20 ff.

[140] J. Rezek, Le droit international de la nationalité, 198 *Recueil des Cours* (1986-III), p. 360.

3.75 These facts appear to be undisputed between the parties. As Germany discovered in the course of the preparation of the present Memorial, several government agencies within the United States were aware of the German nationality of Karl and Walter LaGrand right from the moment of the imprisonment of the two brothers.[141] Even before, upon their entry into the United States they were both provided with Alien Registration Cards.[142] Further, the Immigration & Naturalization Service of the US-Department of Justice treated them as (deportable) aliens, in concrete terms, as German citizens.[143] That Karl and Walter LaGrand never acquired the nationality of the United States is equally undisputed between the parties.[144]

3.76 Hence, since Karl and Walter LaGrand were German nationals all their life, and since they never acquired any other nationality, Germany is entitled to bring this Case before the International Court of Justice, and the claims which it raises here are admissible.

VI. Conclusion

3.77 For the reasons given in the present Chapter, Germany respectfully requests the Court to declare that it has jurisdiction to hear this case and that each and every claim Germany has raised is admissible.

3.78 Germany is aware that findings on questions of jurisdiction and admissibility within the framework of a procedure on Provisional Measures are of a merely *prima facie* nature and do not prejudge the question of the Court's jurisdiction to rule on the merits. However, with all due respect, it might be permitted to recall that both in its Order concerning the request for the indication of Provisional Measures in the *Breard* Case as well as in the respective Order in the *LaGrand* Case, the Court has not expressed the slightest doubt about its jurisdiction and the admissibility of the various claims. This is remarkable in so far as in the former case the United States had raised certain objections to the Court's jurisdiction. These objections were, however, categorically rejected by the Court in their entirety.[145]

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[141] See *supra* Part Two, note 6 and 7 and accompanying text.

[142] Alien Registration Cards Nos. A-14 865 867 and A-14 865 868.

[143] ANNEX 42.

[144] See, *e.g.*, the letter of the U.S. Immigration and Naturalization Service to the German

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Consulate in Los Angeles of 10 December 1992, ANNEX 43.

[145] *Vienna Convention on Consular Relations (Paraguay v. United States of America)*, *supra* note 43, at pp. 256 ff. (paras. 31 ff.).

Part Four

Obligations breached by the United States

4.01 Germany will now turn to an analysis of the obligations which were breached by the United States. As Germany will elaborate in necessary detail, by not informing the LaGrand brothers of their right to have the U.S. authorities notify the German consulate of their arrest and detention, and by thus not providing the consulate with access to them, and by ultimately executing them, the United States has violated the following obligations embodied in Art. 36 of the Vienna Convention on Consular Relations:

(1) First of all, the obligation to inform a national of the sending state without delay of his or her right to inform the consular post of his home State of his arrest or detention (Art. 36 [1] [b]); but also, as a consequence

(2) the obligation to grant the consulate of the sending State the freedom of communication with its nationals detained by the receiving State, including its right to visit, and, *vice versa*, the obligation to grant the nationals of the sending State the freedom to communicate with and have access to the consulate of the sending State (Art. 36 [1] [a] and [c]).

4.02 In addition, by upholding laws that prevent a defendant from raising the said violations of Art. 36 (1) of the Vienna Convention before its domestic courts and by not providing for any effective mechanism to remedy the violation of the correlative rights, the United States has committed a breach of its obligation

(3) to enable full effect to be given to the purposes for which the rights embodied in Art. 36 (1) are accorded (Art. 36 [2] of the Vienna Convention on Consular Relations).

4.03 Further, by its failure to allow German nationals the exercise of the rights accruing to them as aliens under Art. 36 of the Vienna Convention, the United States has also breached

(4) the minimum rights of aliens in foreign States, giving rise to the law of diplomatic protection.

4.04 Finally, by not observing the Order on Provisional Measures pronounced by the Court on 3 March 1999 "to take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision" of the International Court of Justice on the matter,[146] the United States has not abided by

(5) its obligation under Art. 94 of the Charter of the United Nations and Art. 41 of the Statute of the International Court of Justice "to comply with the decision of the International Court of Justice in any case to which it is a party" and its corresponding duty not to render impossible the judicial task of the Court.

In the following, Germany will set out these violations in detail.

I. Breaches of Article 36 of the Vienna Convention on Consular Relations

4.05 As the United States itself has explained before this Court in the *Hostages* case:

> "The right of consular officers in peacetime to communicate freely with co-nationals has been described as implicit in the consular office, even in the absence of treaties ... . As Article 5 of the [Vienna] Convention makes plain, a principal function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason the channel of communication between consular officers and nationals must at all

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[146] *LaGrand (Germany v. United States of America), Provisional measures, Order of 3 March 1999, I.C.J. Reports 1999*, p. 16 (para. 29).

> times remain open. Indeed, such communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations ... ."[147]

Germany fully shares this assessment of the importance of the rights and obligations enshrined in Art. 36 of the Vienna Convention. Unfortunately, in the present Case, the United States itself has not acted according to this statement and has not ensured that Art. 36 of the Vienna Convention was complied with properly. By not advising the LaGrand brothers of their right under Art. 36 (1) (b) of the Convention to inform the German consulate, by thereby preventing Germany from exercising its rights to access to and communication with its nationals guaranteed by Art. 36 (1) (a) and (c), and by upholding internal laws which do not enable full effect to be given to the rights provided for by Art. 36 (1), the United States has breached its obligations under Art. 36 of the Vienna Convention.

1. Omission of advice to German nationals on their right to consular access in violation of Article 36 (1) (b) of the Convention

4.06 There cannot be any doubt whatsoever that the United States has violated Art. 36 (1) (b) of the Vienna Convention by not informing the German consulate of the arrest and detention of the LaGrand brothers "without delay" in 1982. Thus, it was only in mid-1992 that the German Consulate General in Los Angeles became aware of the fact that the two German nationals sentenced to death were being held in prison.

4.07 According to Art. 36 (1) (b) of the Vienna Convention on Consular Relations,

> "[i]f he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by

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[147] *I.C.J. Pleadings, United States Diplomatic and Consular Staff in Tehran*, p. 174.

> the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph".

Accordingly, once a national of the sending State is arrested and detained, a two-step-procedure must follow: First, the arrested and detained person has to be advised of his or her right to inform the sending State's consulate of the arrest. Second, if he or she then wishes to address a communication concerning his or her arrest or detention to the consulate, the authorities of the receiving State must forward this communication to the consulate of the sending State in the consular district concerned.

4.08 The purpose of this provision is clear: the arrested or detained foreigner shall have access to the consular facilities of his or her home State at any time. As Professor Luke Lee has observed:

> "Essential to the fulfilment of a consul's protective functions are his right to be informed immediately of a detention of nationals of the sending State, to visit them in prison, and to assist them in legal and other matters."[148]

In no way was this provision an innovation made by the Vienna Convention. It only confirmed a long-standing practice established by bilateral treaties on consular relations to the same effect.

4.09 The right to notification of one's consulate has even been considered part of customary international law.[149] For instance, when Californian officials denied the Mexican consulate the right to communication with a Mexican national detained in the State of California, the United States Department of State advised the local authorities that

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[148] L. Lee, *Consular Law and Practice* (2d ed. 1991), p. 134.

[149] *Ibid.*, at p. 136; J. Steinkrüger, in: G. Hecker/G. Müller-Chorus (eds.), *Handbuch der konsularischen Praxis* (2d ed. 1999), § 9, margin note 4.

> "[e]ven in the absence of applicable treaty provisions this Government has always insisted that its consuls be permitted to visit American citizens imprisoned throughout the world ... ."[150]

Subsequent to the intervention of the Federal authorities, California allowed the Mexican consul to visit the detainee.

4.10 Following the adoption of the 1963 Vienna Convention, it was the United States in particular which insisted – and rightly so – on strict compliance with the provisions of the Convention, even by countries which had not yet ratified it. For instance, in a case which arose before the ratification of the Vienna Convention by Syria, Syria detained United States citizens without informing the U.S. consulate. In an instruction to its consul to Syria, the U.S. Department observed that

> "[t]he right of governments, through their consular officials, to be informed promptly of the detention of their nationals in foreign states, and to be allowed prompt access to those nationals, is well established in the practice of civilized nations. The recognition of these rights is prompted in part by considerations of reciprocity. ... The Government of the Syrian Arab Republic can be confident that if its nationals were detained in the United States the appropriate Syrian officials would be promptly notified and allowed prompt access to those nationals." [151]

4.11 There is one important difference between the rules usually to be found in bilateral treaties on consular relations and the Vienna Convention. Whereas the bilateral treaties either provide for automatic notification of the consulate or make the information of the consulate dependent on the demand of the detainee, and thereby also of his or her knowledge of his or her rights, the Vienna Convention has devised an elaborate mechanism to ensure that, on the one hand, the detainee is informed of his or her rights but, on the other hand, that it is for him or her to decide whether he or she wants the consulate to be contacted or not. Thus, notification of the consulate without or against the will of the person concerned is excluded. We will turn later to the consequences of this provision of the Vienna Convention for the question of whether Art. 36 (1) (b) embodies an individual right.

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[150] See G. Hackworth, *Digest of International Law*, vol. IV (1942), pp. 836 f.

[151] Cabled instruction to the U.S. Consul in Syria, *reprinted in*: E. McDowell (ed.), *Digest of United States Practice in International Law* 1975, pp. 249 f.

4.12 In the present Case, the violation of Art. 36 (1) (b) is as obvious as it could possibly be:

The LaGrands were arrested on 7 January 1982, on the very day the robbery at the Valley National Bank in Marana (Arizona) had taken place, at about 3 p.m local time. In spite of the fact that on the arrest form of Karl LaGrand the place of birth of the detainee was indicated as "Ausberg, Germany" (apparently referring to the German city of Augsburg) nobody considered it necessary to inform the brothers of their right to contact the German consulate. Neither did the authorities inform the consulate on their part, although they were – as State Attorney Peasley had to admit during the clemency hearing concerning Karl LaGrand on 23 February 1999 – perfectly aware of the German nationality of the arrested brothers. The ensuing "delay" of ten years during which Germany did not know of the arrest and of the criminal proceedings is totally unacceptable – especially in view of the insufficient remedies provided in United States law for violations of the Vienna Convention (on which later). On top of this, it was not the United States but rather the LaGrand brothers themselves who ultimately established contact with the German consulate in order to receive consular assistance. The United States has to date not even apologised for such blatant disregard of its obligations under Art. 36 (1) (c) of the Vienna Convention.

4.13 Unfortunately, this case appears to be anything but singular. As an American observer has noted on the practice of the United States in the matter: "[N]otification is seldom provided at the state or local level."[152] In the recent past, again, several German nationals have been arrested and detained in the United States without receiving information about their right to consular assistance "without delay". For the period of 1998 and 1999 alone, at least eight respective cases of violations of the Vienna Convention on Consular Relations involving German nationals have been brought to the attention of the German authorities.[153] A number of other cases are presently under investigation and there might be further instances in which Germany does not yet know of failures to render the consular advice required by the Vienna Convention. As this Court was informed in the *Breard* Case,[154] several other countries share the German experience.[155] Since that case, at least one foreign national has been executed in spite of the breach of the notification requirements of the Vienna Convention and despite vigorous protests of the home country concerned.[156] In 1997, against the background of this factual situation in the United States, the Inter-American Court of Human Rights was requested to render an advisory opinion on the *Application of the Death Penalty in Violation of the Vienna Convention on Consular Relations and International Human Rights Guarantees*.[157]

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[152] W. Aceves, The Vienna Convention on Consular Relations: A Study of Rights,

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Wrongs, and Remedies, 31 *Vanderbilt Journal of Transnational Law* (1998), p. 275.

[153] These cases include the arrest and detention of German nationals in California (Ms. Katharina Grant), Connecticut (Ms. Susann Hanisch), Florida (Mr. Sven Olaf Diemer, Mr. Thomas Eichner, Mr. Ronny Wirth), Oregon (Ms. Marieluise Veronika Kashefi), and Virginia (Mr. Otto Bresselau von Bressendorf, Ms. Barbara Lichtenberg).

[154] *Vienna Convention on Consular Relations (Paraguay v. United States), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 248.

[155] See also the cases reported by Aceves, *supra* note 152, at pp. 267 ff.; R. Doherty, Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility Under International Law, 82 *Virginia Law Review* (1996), pp. 1318 ff.; S. Shank/J. Quigley, Foreigners on Texas's Death Row and the Right of Access to a Consul, 26 *St. Mary's Law Journal* (1995), pp. 722 ff.

[156] See the case of the Canadian Stanley Faulder executed in Texas on 17 June 1999; *Faulder v. Johnson*, 178 F.3d 741 (5th Cir.), *cert. denied*, 119 S.Ct. 2363; *Faulder v. Johnson*, 81 F.3d 515 (5th Cir.), *cert. denied* under the name *Faulder v. Texas*, 119 S.Ct. 909 (1999).

[157] Request for an Advisory Opinion No. OC-16 to the Inter-American Court of Human Rights, submitted by the Government of the United Mexican States of 17 November 1997, ANNEX 44. Oral hearings in this case have been held on 12 and 13 June 1998.

4.14 The wording of Art. 36 (1) (b) is crystal clear. The issue of whether Art. 36 provides not only a right appertaining to Germany but also an individual right for its nationals will be taken up later. But already at this point it is important to state that this issue is not decisive for the existence of a breach of an international obligation committed by the United States as against the Federal Republic of Germany. Art. 36 (1) (b) is a treaty obligation of the United States towards Germany, and Germany has the right to see it respected vis-à-vis its nationals, whether they happen to live in or just visit the United States.

2. Resulting breaches of Articles 36 (1) (a) and (c) of the Convention

4.15 In addition to the breach of Art. 36 (1) (b) of the Vienna Convention, the United States has also violated Art. 36 (1) (a) and (c) of the Vienna Convention, because it failed to enable the LaGrand brothers to have access to the German consulate. The two respective subparagraphs of Art. 36 (1) read:

> "With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> (a) Consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;
>
> (b) ...;
>
> (c) Consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. ... ."

4.16 If the notification required by Art. 36 (1) (b) does not take place, and the detainee is not informed of his or her right to consular access, a foreign consulate might, possibly for a long time, remain unaware of the fact that a national of the sending State is held in custody in the receiving State. Consequently, consular access cannot be provided and the exercise of the rights accorded by Art. 36 (1) (a) and (c) Vienna Convention will be frustrated.

Hence, in our specific Case, by not fulfilling its obligation to inform the German consulate according to Art. 36 (1) (b), the United States also violated the right to consular access provided for in Art. 36 (1) (a) and (c). This violation continued until Germany became aware of the German nationality of the LaGrand brothers and was allowed to provide consular services, that is, in 1992.

3. Breach of Article 36 (2) of the Vienna Convention through application of the municipal law doctrine of procedural default

4.17 Under Art. 36 (2) of the Vienna Convention, the United States is under an obligation to ensure that its municipal

> "laws and regulations ... enable full effect to be given to the purposes for which the rights accorded under this article are intended."

The United States is in breach of this obligation by upholding rules of domestic law which make it impossible to successfully raise a violation of the right to consular notification in proceedings subsequent to a conviction of a defendant by a jury, and by applying these rules to the case of the brothers LaGrand.

a) Interpretation of Article 36 (2) of the Vienna Convention

4.18 In view of the importance of the communication between a consulate and the nationals of the sending State, the principal purpose of Art. 36 of the Vienna Convention is to ensure that States Parties are able to render consular assistance to nationals detained and charged with offences under the jurisdiction of other States Parties. Thus, the requirement of notification set up in Art. 36 (1) (b) constitutes the cornerstone of the system of protection of foreign nationals designed by the 1963 Convention. In order to give "full effect" to this provision, States Parties must not only inform persons detained "without delay" of their right to inform their consulate of their arrest and detention, but also must react to the non-observance of this obligation by their authorities so as to ensure that "full effect" be given to the observance of the Vienna Convention. If non-observance of the obligation to notify were not followed by a reversal of judgments thus infected by a lack of consular advice, the omission of notification would not only go unheeded, but would – particularly in an adversarial system of criminal justice, like that of the United States – even constitute a kind of "advantage" for the law-enforcement authorities of the receiving State which would then not have to deal with the foreign consulate and with a detainee well-informed of his or her rights.

4.19 This contextual interpretation is confirmed by the *travaux préparatoires* of the Vienna Convention. According to Art. 32 of the Vienna Convention on the Law of Treaties,[158] which expresses customary international law on the matter,[159] the drafting history constitutes a subsidiary but nonetheless important means of interpretation. A review of the drafting history of Art. 36 (2) illuminates the breadth of the obligation which that provision imposes on States Parties. It confirms that the purpose of this provision is to ensure that municipal law meets certain minimum requirements for the effective domestic implementation of the obligations enshrined in the Convention.

4.20 The paragraph as originally proposed by the International Law Commission provided as follows:

> "The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the

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[158] Vienna Convention on the Law of Treaties of 23 May 1969, 1155 UNTS, p. 331.

[159] See *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994,* pp. 21 f. (para. 41), quoted also in *Maritime Delimitation and Territorial Questions between Qatar and Bahrein, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1995,* p. 18 (para. 33): "Il peut être fait appel à titre complémentaire à des moyens d'interprétation tels les travaux préparatoires et les circonstances dans lesquelles le traité a été conclu." See also I. Sinclair, *The Vienna Convention on the Law of Treaties* (2d ed. 1984), p. 19 (with further references): "[T]here is now strong judicial support for the view that the rules of treaty interpretation incorporated in the Convention are declaratory of customary law."

> receiving State, subject to the proviso, however, that the said laws and regulations *must not nullify* these rights."[160]

4.21 Obviously, a provision thus phrased would have been much weaker than the current version. However, in the ensuing discussion, several members of the Commission expressed the opinion that domestic law must be in accordance with the individual rights enshrined in the future Convention:

In the opinion of Mr. Georges Scelle,

> "Inasmuch as the status of aliens was governed by law, and was not merely a de facto status, and as, in case of conflict, international law prevailed over municipal law, any local law that hampered the consul in his exercise of the essential function of protecting his fellow citizen's human rights in the receiving State would be superseded by the rules of international law as embodied in the Commissions's code. Indeed, he would go so far as to say that a consul could provoke an international debate on the validity of the local law which conflicted with a principle of international customary or treaty law."[161]

4.22 It was only at the 1963 Conference that the present version was proposed. The article now read:

> "[T]he said laws and regulations must enable *full effect* to be given to the *purposes* for which the rights accorded under this article are intended."[162]

This wording, which then found its way into the final text of the Convention, changed the ILC proposal in two respects: First, the term "full effect" is much stronger than the term "not nullify", making it clear that the treaty provisions giving rise to the rights under consideration here must not only be somehow kept in existence (not nullified), but rather be implemented completely and effectively. Second, the reference to the "purposes" of the Convention means that the full effect to be given to the Convention not only relates to the rights accorded but also extends to the actual *purpose* which these rights are to serve. In other words, what is required is not merely that particular provisions of national law must not violate the Convention. Rather, the municipal law as a whole of the State party must give full effect to the Convention, thus allowing the actual exercise of the rights provided for in the Convention.

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[160] Draft articles on consular relations adopted by the International Law Commission at its thirteenth session, UN Doc. A/CONF.25/6, in: *United Nations Conference on Consular Relations, Official Records*, vol. II, UN Doc. A/CONF.25/16/Add. 1, p. 24 (emphasis added).

[161] *Yearbook of the International Law Commission* 1960, vol. I, p. 51 (para. 25).

[162] The text is based on a proposal by the United Kingdom, UN Doc. A/CONF.25/C.2/L.107, in: *United Nations Conference on Consular Relations, Official Records*, vol. II, UN Doc. A/CONF.25/16/Add.1, p. 85 (emphasis added). See also the discussion of the UK amendment to the International Law Commission's Draft in the 18th meeting of the Second Committee of the 1963 Conference, in: *United Nations Conference on Consular Relations, Official Records*, vol. I, UN Doc. A/CONF.25/16, p. 346 (para. 47). The amendment was adopted by 42 votes to 14, with 11 abstentions;

4.23 In the plenary of the 1963 Conference, an attempt by the Union of the Socialist Soviet Republics to restore the weaker version originally proposed by the ILC was rejected.[163] As the delegate of the United Kingdom said in defence of the new text:

> "[I]t was most important that the substance of the rights and obligations specified in paragraph 1 should be preserved, which they would not be if the Soviet Union amendment were adopted."[164]

Hence, what this demonstrates is that the Conference was fully aware of the impact of the difference between the wording proposed by the ILC and that ultimately adopted in Vienna. By deciding in favour of the stronger version, the Conference rejected the attempt to water down the obligations to be enshrined in the Convention.

Interestingly, in the hearing on Provisional Measures in the *Breard* Case in 1998, it was the Soviet proposal defeated at the 1963 Conference, and not the wording of the Convention as finally adopted, which the United States referred

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ibid., 19th Meeting of the Second Committee, pp. 347 f.

[163] By 33 to 32, with 16 abstentions, see 12th plen. mtg., Agenda Item 1, *United Nations Conference on Consular Relations, Official Records*, vol. I, UN Doc. A/CONF.25/16, p. 40 (paras. 2-9).

[164] *Ibid.*, para. 7.

to in arguing that Art. 36 does not require a minimum standard for domestic law.[165]

4.24 To sum up this point, in the words of Shank and Quigley, the drafting history of the Vienna Convention supports the argument "that Article 36 prevails over domestic procedure".[166] Accordingly, if the domestic law of a State party to the Convention does not provide for the enforcement of the obligation of notification, it will not meet the requirement to give full effect to the rights contained in Art. 36 of the Convention.

b) The insufficiency of United States law

4.25 United States law does not provide an effective remedy for the violation of the requirement of notification and the resulting violation of Art. 36 (1) (a) – (c) of the Convention in the case that the omission of consular notification is discovered after a defendant has been convicted in a jury trial. In any case, a violation of Art. 36 cannot be remedied in the same way as a violation of rights of the accused stemming from federal constitutional law. It may be true in principle that, as the Solicitor General emphasised before the U.S. Supreme Court in the *Breard* case,

> "the procedural requirements for orderly presentation of claims and objections to a trial court of criminal jurisdiction are surely valid 'laws and regulations' of the United States with which any claim of a failure of consular notification must comply."[167]

However, there exists a particular rule in U.S. law which in the view of Germany is in conflict with the requirement of Art. 36 (2) of the Vienna

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[165] *Application of the Vienna Convention on Consular Relations (Paraguay v. United States), Request for the Indication of Provisional Measures*, Oral Argument of 7 April 1998, Uncorrected Verbatim Record, CR 98/7, para. 3.27 (Mr. Crook).

[166] See S. Shank/J. Quigley, Obligations to Foreign Nationals Accused of Crime in the United States: A Failure of Enforcement, 9 *Criminal Law Forum* (1999), p. 108.

[167] 1997 U.S. Briefs 1390, ANNEX 34, at p. 39.

Convention according to which national law must give full effect to the rights accorded in Art. 36 (1) of the Vienna Convention.

(1) The rule of procedural default in U.S. domestic law

4.26 In the present context it is not necessary to give a complete presentation on the content and function of the rule of procedural default to be applied in federal *habeas corpus* proceedings in U.S. law.[168] To the extent that this rule does not affect international legal matters, it is of no concern to the present proceedings. However, in the LaGrand Case, the rule of procedural default has been applied in a way which is of utmost relevance here because it deprived the brothers of the possibility to raise the violations of their right to consular notification in U.S. criminal proceedings. In order to demonstrate the failure by the United States to comply with its commitments under the Vienna Convention, it is necessary to briefly discuss the system of appellate jurisdiction in the United States in its relationship with the treaty rights involved.

4.27 In principle, U.S. federal courts possess the so-called *habeas jurisdiction* when a prisoner alleges that his or her detention violates treaties concluded by the United States. 28 U.S.C. § 2254 (a) provides:

> "The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

In the present as well as in other criminal cases, however, U.S. courts have denied all appeals based on violations of the Vienna Convention by either denying actual prejudice – i.e., arguing that the lack of consular notification had no effect on the criminal proceedings – or by applying the doctrine of so-called procedural default.

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[168] Cf. L. Tribe, *American Constitutional Law* (2d ed. 1988), pp. 171 ff.; J. Liebman/R. Hertz, *Federal Habeas Corpus Practice and Procedure* (3d ed. 1998). For a historical overview of the jurisprudence of the Supreme Court on the question, see *Coleman v. Thompson*, 501 U.S. 722, 744 ff. (1991) (O'Connor, J.); *Murray v. Carrier*, 477 U.S. 478 (1986), at 485 (O'Connor, J); *Wainwright v. Sykes*, 433 U.S. 72, 77 ff. (1977) (Rehnquist, J., now C.J.).

4.28 The rule of *procedural default* is closely connected with the division of labour between federal and state jurisdiction in the United States. The United States is a federal State which knows a relatively strict separation between the federal government and the state governments, including the respective judicial branches. Criminal jurisdiction belongs to the States except in cases provided for in the Constitution.[169] As the U.S. Supreme Court has explained in *Picard v. Connor*, the doctrine of procedural default consists in the requirement of exhaustion of remedies at the State level before a *habeas corpus* motion can be filed with federal Courts:

> "It has been settled since *Ex parte Royall*, 117 U.S. 241 (1886), that a state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus."[170]

And further:

> "Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies. ... We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts."[171]

4.29 There is only one exception to this exclusion of challenges not raised before State courts: The showing of both *cause* for and *prejudice* resulting from the default:

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[169] See Article III of the U.S. Constitution. Cf. also the Tenth Amendment of 1791 which reads as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." For details concerning the borderline between federal and state jurisdiction drawn by the Supreme Court see L. Tribe, *American Constitutional Law* (2d ed. 1988), pp. 162 ff.

[170] 404 U.S. 270, 275 (1971).

[171] *Ibid.*, at pp. 276, 278.

> "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."[172]

Cause requires the prisoner to show

> "that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule."[173]

For ***prejudice***, the habeas petitioner must show

> "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."[174]

4.30 The standard for this exception is very high, however. Its aim is limited to preventing a "miscarriage of justice".[175] Accordingly, the claimant has not only to prove that he or she could not have raised the matter before, but also that the conviction is wrong precisely because of this failure. Neither is incompetence of the defence lawyer recognised as a ground for admitting a challenge to a conviction, if the ground was not already raised in State proceedings:

> "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule. ... [T]he exhaustion doctrine ... generally requires that a claim of ineffective assistance be presented to the

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[172] *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (O'Connor, J.); see also ***Murray v. Carrier***, 477 U.S. 478, 494 (1986) (O'Connor, J.); ***Engle v. Isaac***, 456 U.S. 107 (1982), at p. 134, n. 43 (O'Connor, J.); ***Francis v. Henderson***, 425 U.S. 536, 542 (1976) (Stewart, J.); ***Wainwright v. Sykes***, 433 U.S. 72, 87, 90 (1977) (Rehnquist, J., now CJ.).

[173] *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (O'Connor, J.).

[174] *United States v. Frady*, 456 U.S. 152, 170 (1982) (O'Connor, J.).

[175] *Sykes*, at p. 91.

> state courts as an independent claim before it may be used to establish cause for a procedural default."[176]

In most cases, fault of the attorney alone is not sufficient for demonstrating cause and prejudice:

> "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective ... we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default."[177]

However, the standard for "constitutional ineffectiveness", as established in *Strickland v. Washington*, is quite high:

> "[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment."[178]

4.31 Concerning death penalty cases, the harshest criticism of this jurisprudence comes from within the Supreme Court itself: In the words of the late Justice Blackmun:

> "In a sleight of logic that would be ironic if not for its tragic consequences, the majority concludes that a state prisoner pursuing state collateral relief must bear the risk of his attorney's grave errors – even if the result of those errors is that the prisoner will be executed without having presented his federal claims to a federal court ... ."[179]

This reasoning equally applies to claims based on the Vienna Convention as a treaty constituting "the supreme law of the land", a rank equal to federal laws.[180]

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[176] *Murray v. Carrier*, 477 U.S. 478, 488 f. (1986) (O'Connor, J.); see also *Engle v. Isaac*, 456 U.S. 107, 133 f. (1982) (O'Connor, J).

[177] *Carrier*, at p. 488 (O'Connor, J.), footnote added, also cited in *Coleman*, at p. 752 (O'Connor, J.).

[178] *Strickland v. Washington*, 466 U.S. 668, 690 (O'Connor, J.).

[179] *Coleman*, at p. 771.

[180] Art. VI cl. 2 U.S. Constitution. See also *Breard v. Greene*, 118 S.Ct. 1352 (1998), 37 *International Legal Materials* (1998), p. 828; *Reid v. Covert*, 354 U.S. 1, 18 (1957)

4.32 To the best of Germany's knowledge, no federal court has ever recognised that the failure of counsel to raise the violation of Art. 36 of the Vienna Convention in State proceedings would amount to ineffective counselling pursuant to the *Strickland* criteria. In any case, the ineffectiveness of counsel does not dispense with the requirement to show prejudice. A failure to invoke the lack of consular notification in the original trial will not be sufficient to claim cause and prejudice due to ineffective counselling. Therefore, the *habeas corpus* claim will remain unsuccessful.

4.33 Only in the exceptional case where a violation of a constitutional right has led to the conviction of an innocent person, the showing of cause for the procedural default can be dispensed with.[181] To meet this standard of "miscarriage of justice" in death penalty cases, the petitioner must at least show "innocence of the death sentence", that is, that the death penalty was wrongly imposed. In this instance,

> "to show 'actual innocence', one must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."[182]

However, that showing may not include additional mitigating evidence not considered during the trial phase.[183] In principle, claims not based on established federal constitutional law cannot be relied on in *habeas* proceedings. Exceptions in the case of the enunciation of new "watershed legal

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(plurality opinion).

[181] *Carrier*, at p. 496 (O'Connor, J.): "[I]n an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." See also *Teague v. Lane*, 489 U.S. 288, 313 (O'Connor, J.); *Sawyer v. Whitley*, 505 U.S. 333, 335 ff. (1992) (Rehnquist, C.J.).

[182] *Sawyer*, at p. 336. For an application of this doctrine in the LaGrand case, see *Karl LaGrand v. Stewart*, U.S. District Court (D. Arizona), 23 February 1999, ANNEX 45, at p. 14.

[183] *Sawyer*, at pp. 345 ff. (Rehnquist, C.J.).

rules" are recognised only rarely.[184] A violation of a treaty will usually not be equated with the violation of constitutional rights.[185] Thus, to the best of Germany's knowledge, none of the Courts involved did even raise the possibility of applying the "actual innocence" jurisprudence to violations of the Vienna Convention, neither in the case of the LaGrands nor in other cases concerning the Vienna Convention.[186]

4.34 The *Antiterrorism and Effective Death Penalty Act* of 1996 ("AEDPA")[187] has made it even more difficult to challenge a state conviction. A *habeas* petitioner alleging to be held in violation of treaty law will not even be granted an evidentiary hearing to establish prejudice.[188] Thus, in the *Breard* case, the Supreme Court only referred to the first phrase of Art. 36 (2) of the Vienna Convention – apparently disregarding the second phrase – and applied the domestic rules of procedural default and the AEDPA to justify its refusal to deal substantively with Breard's claim of a violation of Art. 36 of the Vienna Convention.[189]

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[184] *Teague v. Lane*, 489 U.S. 288, 311 ff. (1989). *Cf. ibid.*, at p. 313: "[W]e believe it unlikely that many such components of basic due process have yet to emerge."

[185] See *infra* note 198 for a judgment concerning a similar provision in a legislative act.

[186] See, *e.g.*, *Karl LaGrand v. Stewart*, U.S. District Court (D. Arizona), 23 February 1999, ANNEX 45, pp. 6 f.

[187] Pub.L. No. 104-132, 110 Stat. 1214 (1996).

[188] 28 U.S.C. § 2254(a), (e) (2) (ii) (Supp. 1998):

> "If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on –
>
> (i) … .
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

4.35 In addition, in order to obtain a certificate of appealability against a (federal) District Court judgment, "a substantial showing of the denial of a constitutional right" is required.[190] Since U.S. courts have ruled that violations of treaty rights cannot be equated to violations of constitutional rights, the rejection of claims arising out of a violation of the requirement of notification contained in Art. 36 of the Vienna Convention in a Federal District Court is not appealable to higher federal courts.

> "[R]ights under a treaty and rights under a federal statute are not the equivalent of constitutional rights. ... Even if the Vienna Convention on Consular Relations could be said to create individual rights ..., it certainly does not create constitutional rights."[191]

Therefore, even when a claim of violation of the Vienna Convention is validly raised in state proceedings, it cannot reach the federal Court of Appeal, but will be decided in the lowest federal Court, the District Court. By this token, a violation of Art. 36 (2) of the Vienna Convention is reviewed less thoroughly than a violation of a provision of the domestic constitution.

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[189] *Breard*, 37 *International Legal Materials* 826, 828 (1998): "[A]lthough treaties are recognized by our Constitution as the supreme law of the land, that status is no less true of provisions of the Constitution itself, to which rules of procedural default apply." The AEDPA "prevents Breard from establishing that the violation of his Vienna Convention rights prejudiced him."

[190] 28 U.S.C. 2253 (c) reads:

> "(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
>
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; ...
>
> (B) ... .
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

[191] *Ohio v. Loza*, 1997 WL 634348 (Ohio App. 12 Dist.), p. 2. This judgment denied a motion concerning the violation of Art. 36 at state postconviction proceedings which are reserved for the violations of constitutional rights. See also *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1993); *Murphy v. Netherland*, 116 F.3d 97, 100 (1997).

(2) *The application of the doctrine of procedural default in the case of the LaGrand brothers and similar cases regarding Article 36 (2) of the Vienna Convention*

4.36 The jurisprudence just described made it impossible for the LaGrand brothers to effectively raise the issue of the lack of consular notification after they had at last learned of their rights and established contact with the German consulate in Los Angeles in 1992. On 16 January 1998, the United States Court of Appeals of the 9th Circuit decided that the claim of violation of the Vienna Convention was procedurally defaulted, even though the violation itself was not in dispute:

> "It is undisputed that the State of Arizona did not notify the LaGrands of their rights under the Treaty. It is also undisputed that this claim was not raised in any state proceeding. The claim is thus procedurally defaulted."[192]

4.37 The Circuit Court expressly rejected the argument that the LaGrands had been blocked from obtaining evidence on their abusive childhood in Germany, by pointing to the jurisprudence of the U.S. Supreme Court[193] according to which this claim to

> "actual innocence of the death penalty must focus on eligibility for the death penalty, and not on additional mitigation".[194]

Since this was not the case, the brothers' claim of violation of Art. 36 of the Vienna Convention on Consular Relations was procedurally defaulted, and their claim was dismissed. The substantive argument to the effect that additional mitigation might have prevented the pronouncement of the death penalty was not discussed. The United States Supreme Court denied *certiorari*, that is, it denied to hear the case.[195]

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[192] *LaGrand v. Stewart*, 133 F.3d 1253, 1261 (9th Cir. 1998), ANNEX 10.

[193] *Sawyer*, at pp. 345 (1992).

[194] *LaGrand v. Stewart*, 133 F.3d 1253, 1262 (9th Cir. 1998), ANNEX 10.

4.38 Shortly before his execution, on 24 February 1999 (amended 26 February 1999), the 9th Circuit Court rejected a second *habeas corpus* claim of Karl LaGrand which was based, among other arguments, on the lack of consular notification.[196] The Court held the latter claim to be procedurally defaulted. The other decisions in the case were based on different grounds not related to rights under the Vienna Convention.

4.39 The application of the procedural default rule in the LaGrand case in no way constitutes an exception but rather confirms the rule of the non-enforcement of the Vienna Convention by U.S. courts. Thus, in the case of *Faulder v. Johnson*, the 5th Circuit Court denied that the violation of the requirement of notification contained in the Vienna Convention led to actual prejudice:

> "While we in no way approve of Texas' failure to advise Faulder, the evidence that would have been obtained by the Canadian authorities is merely the same as or cumulative of evidence defense counsel had or could have obtained."[197]

4.40 In our specific context, the decision of the 4th Circuit Court of Appeals in the case *Murphy v. Netherland* is especially revealing: On the one hand, the judgment asserts that a violation of the Vienna Convention does not amount to

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[195] 119 S.Ct. 422 (1998).

[196] *LaGrand v. Stewart*, 170 F.3d 1158, 1161 (9th Cir. 1999), ANNEX 21:

> "Federal habeas review is not available on this claim unless LaGrand can show cause for his default and actual prejudice. ... Having been 'presented in a prior application' for federal habeas relief under § 2254, LaGrand's arguments cannot be presented in an [extraordinary] SOS petition. See 28 U.S.C. § 2244 (b) (1)."

Previously, the Arizona state court had dismissed the claim because it found it procedurally barred under an Arizona Rule of Criminal Procedure, 32.2 (a) (3), which provides: "A defendant shall be precluded from ... relief ... based upon any ground ... that has been waived at trial, appeal, or in any previous collateral proceeding."

[197] *Faulder v. Johnson*, 81 F.3d 515, 520 (5th Cir. 1996), *cert. denied*, 519 U.S. 995, 117 S.Ct. 487. To the same effect, see *Murphy v. Netherland*, 116 F.3d 97, 100 f. (4th Cir.

"a substantial showing of the denial of a constitutional right" which the AEDPA requires in order to allow appeals against district court judgments.[198] On the other hand, the 4th Circuit Court of Appeals held that the claim of violation of the Vienna Convention was defaulted because Murphy had not raised the issue in the state court and could not show cause for his default.

> "The legal basis for the Vienna Convention claim could, as noted above, have been discovered upon a reasonably diligent investigation by his [the defendant's] attorney."[199]

4.41 Thus, the discovery of the omission of consular notification constitutes an important test for the quality of an attorney. At the same time, such lack of notification is precisely one of the reasons why a foreign accused will not receive an adequate defence. Without an adequate defence, however, the accused will not be able to raise the omission of notification.

4.42 In the case of the LaGrand brothers, none of their several counsel engaged in the various proceedings raised the lack of consular notification before 1992. This circumstance alone provides evidence for the insufficient quality of their defence. In the following, the mitigating circumstances relating to the childhood of the LaGrand brothers in Germany could not be raised in the jury phase or later until, at last, the brothers themselves became aware of their rights and received consular assistance. At that stage, however, their claims were procedurally defaulted.[200] If they had had better defence counsel from the outset and thus been able to raise the issue of their German nationality at an earlier stage, the invocation of mitigating circumstances based on their difficult childhood in Germany could have saved them from the death

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1997), *cert. denied*, 118 S.Ct. 26; *Breard v. Pruett*, 134 F.3d 615, 619 f. (4th Cir. 1998).

[198] *Murphy v. Netherland*, 116 F.3d 97, 100 (4th Cir. 1997) referring to 28 U.S.C. § 2253 (c) (2).

[199] *Ibid*. See also *Breard v. Pruett*, 134 F.3d 615, 619 f. (4th Cir. 1998); *Breard v. Netherland*, 949 F. Supp. 1255, 1263 (E.D. Va. 1996).

[200] See *LaGrand v. Stewart*, 170 F.3d 1158, 1161 (9th Cir.), ANNEX 21; *La Grand v. Stewart*, 133 F.3d 1253, 1262 (9th Cir.), ANNEX 10, *cert. denied*, 119 S.Ct 422 (1998), ANNEX 11.

penalty.[201] *Mutatis mutandis*, the situation is similar to that described by the California Supreme Court relating to the right to counsel: "The defendant who does not ask for counsel is the very defendant who most needs counsel."[202] A remark made by Shank and Quigley about the case of Angelo Breard is equally pertinent in the case of the LaGrand brothers: Just as Breard, the LaGrand brothers were

> "not aware of [their] right to be notified of the right of consular access during [their] trial and appeal but became aware of it only when attorneys representing [them] at the *habeas corpus* stage discovered [Arizona]'s error and explained article 36 to [them]. [They] thus [were] unaware that [their] right was violated until the time had passed by which, according to the Supreme Court, [the LaGrands were] required to make [their] claim. And [their] lack of awareness was not through any fault of [their] own, but precisely because [Arizona] authorities had failed to inform [them]."[203]

4.43 Hence, through the application of the rules of procedural default and the requirement to show actual prejudice, an effective raising of the claim of lack of notification is made impossible. No effective remedy for violations of the right to consular notification exists.

4.44 As far as the showing of prejudice is concerned, the very fact that the right to consular access was not invoked during the jury trial demonstrates the lack of adequate defence due to the omission of the necessary notification. Therefore, U.S. law does not effectively protect the rights to consular access enjoyed by a detained person. As Judge Butzner put it in his concurring opinion in *Breard v.*

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[201] For a detailed presentation of this claim, see *infra*, Part Four, Ch. I 3 c). For evidence on the effect of procedural default on challenges of violations of Art. 36 Vienna Convention in other cases, see Shank/Quigley, *supra* note 155, at pp. 722 ff.. See, in particular, *Santana v. State*, 714 S. W. 2d 1 (Tex. Crim. App. 1986) (mitigating circumstances not raised; *cf.* Shank/Quigley, *ibid.*); *Faulder v. State*, 745 S. W.2d 327 (Tex. Crim. App. 1987) (lack of contact with the Consulate prevented Faulder from presenting evidence on his quality as a responsible parent and on his organic brain damage, see Shank/Quigley, *ibid.*, at p. 724).

[202] *People v. Dorado*, 62 Cal. 2d 338, at p. 351, 398 P.2d 361, at pp. 369 f. (Tobriner J.), cited by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 470 (1966) (Warren, C.J.).

Pruett: "Collateral review [e.g. *Habeas corpus* review] is too limited to afford an adequate remedy."[204]

4.45 Academic scholars have expressed similar views regarding the effect of violations of the Vienna Convention in U.S. law in administrative cases:

> "[F]ederal courts have determined that a violation of INS [Immigration and Naturalization Service] Regulations with respect to consular access [that is, administrative regulations implementing the undertakings of the US under Art. 36] will invalidate challenged proceedings only if the defendant can show prejudice. The courts have made this determination despite the fact that no such requirement is set forth in the Vienna Convention."[205]

As Shank and Quigley put it:

> "That standard [demanding the showing of prejudice] would seem too strict to comply with Article 36, which specifies that the right of consular access is an absolute right. Nothing in the text of Article 36 suggests that relief for a foreign detainee should depend on whether he can show prejudice. Moreover, requiring a showing of prejudice would often defeat the right."[206]

And elsewhere:

> "A domestic court may not, consistent with the obligations assumed by a State under the Vienna Convention, erect a requirement that some specific detriment be found."[207]

4.46 In conclusion, Germany entirely shares the following assessment of U.S. practice by Keith Highet:

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[203] Shank/Quigley, Obligations to Foreign Nationals, *supra* note 166, at p. 127.

[204] *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998).

[205] Aceves, 31 *Vanderbilt Journal of Transnational Law* (1998), pp. 277 f. (footnote omitted), citing *U.S. v. Calderon-Medina*, 521 F.2d 529, 531 (9th Cir. 1979); *U.S. v. Rangel-Gonzales*, 617 F.2d 529, 530 (9th Cir. 1980) (finding that prejudice had been shown); *Waldron v. Immigration and Naturalization Service*, 17 F.3d 511, 514 ff. (2d Cir. 1993).

[206] Shank/Quigley, *supra* note 155, at p. 751 (footnote omitted).

[207] Shank/Quigley, *supra* note 166, at p. 110.

> "The purposes of consular access rights are quite obviously to protect the criminal defendant nationals. To cut off the right of appeal on the basis of failure to raise the question of lack of consular access under the Convention in state court, when notification of such consular access was the duty of the arresting (receiving) State and was not in fact performed, is as absurd as Catch-22 but not in the least amusing. It is in fact the precise *opposite* of the performance of the duty to 'enable full effect to be given to the purposes for which the rights accorded under this article are intended.'"[208]

(3) Impossibility of suits by foreign governments

4.47 Foreign governments do not possess a right of action to enforce their rights resulting from Art. 36 of the Vienna Convention on Consular Relations before U.S. courts. U.S. courts, invoking a lack of standing or applying the Eleventh Amendment of the Constitution, which bars

> "any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State",

have consistently denied foreign States and/or their diplomatic or consular representatives a remedy against violations of the Vienna Convention.[209]

(4) Conclusion

4.48 As a result, the domestic law of the U.S. does not

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[208] K. Highet, The Emperor's New Clothes: Death Row Appeals to the World Court? The *Breard Case* As a Miscarriage of (International) Justice, in: *In Memoriam Judge José Maria Ruda*, manuscript, p. 6, ANNEX 39.

[209] See *Republic of Paraguay v. Allen*, 949 F.Supp. 1269, 1272 (E.D. Va. 1996), *aff'd*, 134 F.3d 622 (4th Cir. 1998), *cert. denied*, 118 S.Ct. 1352, 1356 (1998), reprinted in 37 *International Legal Materials* (1998), p. 826; *Germany v. U.S.*, 119 S.Ct. 1016, 1017 (per curiam); *United Mexican States v. Woods*, 126 F.3d 1220, 1223 (9th Cir. 1997), but see *Germany v. U.S.*, 119 S.Ct. 1016, p. 1017 (Souter, J. concurring; Ginsburg, J. joining): "I do not rest my decision to deny leave to file the bill of complaint on any Eleventh Amendment principle"; Aceves, *supra* note 152, at p. 296 (asserting that the Supremacy Clause in Art. VI cl. 2 of the U.S. Constitution, which determines that treaties are "the supreme law of the land", "provides one possible basis for challenging state immunity from suit under the Eleventh Amendment").

> "enable full effect to be given to the purposes for which the rights accorded under this article [Art. 36 VC] are intended."[210]

In fact, in the context of criminal proceedings, U.S. law grants the Vienna Convention no effect at all after the sentencing phase of the original trial, even if the matter was not raised before state courts due to the lack of knowledge of the foreign nationality of the defendant or of the existence of the right to consular notification. As the present Case demonstrates, the doctrine of procedural default was applied in a persistent and rigorous manner throughout each trial. The judicial authorities in question were fully aware that the brothers LaGrand did not know about their rights at the earlier proceedings precisely because U.S. authorities had failed to comply with their obligations under the Vienna Convention to inform them of these rights "without delay".

4.49 Let us not be misunderstood: What is at issue here is not this or that provision of the domestic law of the United States or certain decisions of U.S. domestic courts. As Keith Highet puts it:

> "What is not at stake is the actual correctness of the determinations made by the U.S. courts – and in particular the Supreme Court. What is at issue is the reaction of the other organs of the State concerned – the executive power of the United States – to those inadequate decisions. Moreover, what is not at issue is whether the Supreme Court correctly interpreted U.S. domestic federal appeals practice; it may well have done, but that practice must also be measured against the less subjective lens of international scrutiny, and for reasons of internal illogic alone should be found wanting."[211]

It is the view of Germany that United States domestic law fails this test. Since the rationale of Art. 36 is that notification will enable the consulate to provide a foreigner arrested or detained with adequate remedies to put him or her on an equal footing with defendants possessing the nationality of the receiving State, the United States has violated Art. 36 (2) of the Vienna Convention by preventing the effective exercise of the right to consular assistance after the jury trial and the sentencing phase have been concluded.

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[210] See also Shank/Quigley, *supra* note 155, at p. 748, speaking of "the need for a system to ensure that the United States complies with the Vienna Convention." *Id.*, *supra* note 166, at p. 122: The use of procedural default rule "violates, in particular, paragraph 2 of article 36, which says that while article 36 issues operate in the context of domestic procedures, those procedures must allow full effect to the purposes of consular access."

[211] Manuscript, *supra* note 208, at p. 7.

c) The existence of "prejudice"

4.50 Even if one followed the view that the requirement of "prejudice" under domestic law – that is, an influence of the lack of consular notification on the result of the case – is in line with Art. 36 (2) of the Vienna Convention, U.S. law nevertheless fails to meet the standard of Art. 36 (2): Even if "prejudice" is shown, U.S. law does not allow for the raising of the treaty violation in federal courts if the violation was not raised before in state courts. Therefore, if a foreign national did not know of his or her right until after the end of the state proceedings, he or she cannot raise the matter later after he or she has discovered the fault of the authorities. This is particularly unacceptable in death penalty cases where execution of the final judgment is irreversible.

4.51 In any event, notwithstanding its view that "prejudice" must not be required by domestic law pursuant to Art. 36 (2) of the Vienna Convention, Germany will show in the following that "prejudice" indeed occurred – in the case of the LaGrand brothers, in particular, Germany will demonstrate that the lack of consular advice was decisive for the infliction and execution of the death penalty. If the LaGrands had been properly informed of their rights, they would have been advised and supported by the German consulate as required by the Vienna Convention. Under these circumstances, the brothers would not have been executed.

Walter and Karl LaGrand would have needed the assistance of German consular officers to help them in obtaining adequate legal representation and to help their lawyers in putting on the best possible defence from the time they were arrested for capital murder. Instead, the LaGrands were represented by court-appointed lawyers who made several grave errors exacerbated by the absence of German consular assistance, including in particular, the inadequate case for mitigation presented at sentencing.

(1) *The burden of proof*

4.52 The burden of proof for the impact of the violation of the Vienna Convention on the trial of the LaGrand brothers is to be borne by the United States. The United States executed the LaGrands before they had the chance to testify on the decisive effect on their trial of the omission of notification. Germany was thus deprived of vital testimonial evidence. In the case of Walter LaGrand, the execution was in flagrant violation of a binding Order of Provisional Measures from this Court.[212]

For this disregard of the Order of the Court, the United States alone is responsible. It is therefore the United States which has to bear all the consequences of such a violation of international law. In the words of Judge Shahabuddeen, citing E. Dumbauld,

> "[w]hen a refusal to furnish information or to carry out provisional measures is put on record, apparently a presumption arises which takes the place of direct evidence in the sense that it legitimates a conclusion derived from the fact in question by reasonable inference."[213]

Therefore, Germany requests that, to the extent there are any disputed issues of material fact relating to Germany's claims as to which the LaGrands' testimony would have been relevant, the Court draw all necessary inferences in favour of Germany and consider such facts as proven.

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[212] On the legally binding character of an Order on Provisional Measures, see *infra* Ch. III.

[213] *Application of the Convention on the Prevention an Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993*, Sep. Op. Shahabuddeen, *I.C.J. Reports 1993*, p. 368, citing E. Dumbauld, *Interim Measures of Protection in International Controversies* (1932), p. 161.

(2) *If properly informed of their rights, the LaGrands would have sought and received consular assistance*

4.53 It is clear that had the LaGrands been properly accorded their rights and thus had been able to contact the German Consulate, German consular officials would have immediately provided protection, support and assistance to their nationals, helping in the preparation of their defence, retention of competent counsel, and collection of important mitigating evidence from family, friends and State agencies in Germany.[214] Germany would have reacted in 1982 with the same high level of commitment, diligence and care that it brought to bear in 1992, upon finally learning, from Karl LaGrand's new counsel, that the LaGrands were on Arizona's death row.[215]

4.54 It is also clear that Germany would have provided precisely the consular assistance the LaGrands needed most. Helping detained nationals to find legal counsel and to collect mitigating and other evidence from the sending state – a task for which consular assistance is truly invaluable – are fundamental consular activities.[216] Under the German Federal Law on Consular Assistance ("Konsulargesetz"), every German citizen being detained for criminal investigation or held prisoner needing legal and consular help in a foreign country is entitled to immediate consular and legal assistance provided for by the respective diplomatic or consular representation of Germany. In an unofficial translation, Articles 1 and 7 of the Law read:

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[214] Memorandum of Law in Support of the Petitioner's Writ of Habeas Corpus by a Person in State Custody, *LaGrand v. Lewis*, 8 March 1993, ANNEX 46, p. 68 (describing how the German consulate would have assisted immediately had they been contacted when the LaGrands were arrested in 1982).

[215] *Ibid.*, at pp. 67 f. (describing how immediately upon being informed of the LaGrands' situation, German consular officials travelled to Arizona to visit them and thereafter remained in "constant communication" and offered the support of the Federal Republic of Germany in opposing their capital sentences).

[216] See Vienna Convention, Art. 5 (i): "Consular functions consist in: ... representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State"; see also M. Kadish, Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul, 18 *Michigan Journal of International Law* (1997), p. 565; Shank/Quigley, *supra* note 155.

> "Article 1. Consular officers (career consular officers or honorary consular officers) shall be required ... to give Germans and domestic juridical persons advice and assistance at their limited discretion [nach pflichtgemäßem Ermessen]." ...
>
> Article 7. Consular officers shall care for Germans remanded in custody pending trial or serving a prison sentence within their consular district and especially provide them with legal protection if so required by such persons."[217]

Paragraph 5 of the Law also provides for financial assistance if necessary.

In addition, a Circular Order ("Runderlaß") issued by the German Foreign Ministry[218] requests all German consular officers and other representatives to provide quick, appropriate and comprehensive support for arrested Germans. If a German consulate learns of the arrest of Germans, it is even required to contact them without a request on their part.[219] The German consular officers are also required to ask, *inter alia*, whether the arrested or detained persons wish to be provided with an attorney, and to provide them with information on their rights in the host country.[220] In case a detained person wishes to receive the assistance of an attorney, the consular officers are required to arrange for competent and reliable counsel. Otherwise, they must take care that such counsel is appointed by the court.[221]

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[217] Gesetz über die Konsularbeamten, ihre Aufgaben und Befugnisse (Konsulargesetz) of 11 September 1974, Bundesgesetzblatt (Federal Gazette) 1974, vol. I, p. 2317. In the German original, the respective paragraphs read:

> "§ 1. Die Konsularbeamten (Berufskonsularbeamte oder Honorarkonsularbeamte) sind berufen, ... Deutschen sowie inländischen juristischen Personen nach pflichtgemäßem Ermessen Rat und Beistand zu gewähren. ...
>
> § 7. Die Konsularbeamten sollen in ihrem Konsularbezirk deutsche Untersuchungs- und Strafgefangene auf deren Verlangen betreuen und ihnen insbesondere Rechtsschutz vermitteln."

[218] Runderlaß as of 15 October 1998, Ch. I guideline 1, with an English translation of the relevant parts, ANNEX 47. This Runderlaß consolidates earlier versions dating back to 1975.

[219] *Ibid.*, Ch. II guideline 1.

[220] *Ibid.*, Ch. II guideline 4 b) and c).

4.55 To turn to our specific Case, upon finally learning of the LaGrands' situation in 1992, Germany came to their assistance in an effective manner, as it has done in the cases of three other Germans on death row in Arizona and Florida, respectively. Germany helped Walter LaGrand collect important mitigating evidence in Germany in 1993.[222] Unfortunately, as described earlier, U.S. procedural rules barred consideration of this new evidence. In comparable cases, too, Germany has supported the defence, for instance by paying for a psychiatric expert opinion and an investigation into unknown facts from the childhood of the accused (as in the case of Michael Apelt currently on death row in Arizona) or by financially supporting attorneys' additional fact-finding efforts not covered by State aid (as in the case of Dieter Riechmann currently under arrest in Florida). Further, German consular officers regularly help Germans to get in contact with capable attorneys or lawyers of their own choice.

4.56 Had Germany been properly afforded its rights under the Vienna Convention, it would have been able to intervene at a time when vigorous assistance would have made a difference. Indeed, Germany's assistance in obtaining competent, experienced trial counsel and presenting a complete, persuasive mitigation case likely would have saved their lives, as these are two fundamental elements in a successful capital defence, one that avoids the death penalty. As four States argued as *amici curiae* to the Supreme Court of the United States in the *Breard* Case:

> "The United States is the only Western industrialized nation that still imposes the death penalty. Because of the severity of the potential

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[221] *Ibid.*, Ch. II guideline 5.

[222] For details see *infra* note 248 and accompanying text.

> punishment, a consul has a special interest in assisting a national who faces a capital charge."[223]

(3) The United States' violation of the Vienna Convention prevented essential mitigating evidence from being presented during sentencing

4.57 Germany's inability to render prompt consular assistance – a direct result of the United States' breach of its Vienna Convention obligations – proved fatal to the LaGrands because it impeded introduction of compelling evidence for mitigation during the sentencing phase of the LaGrands' trial. Germany's co-operation and assistance were necessary for this purpose as much of the available mitigating evidence was located in Germany, including both witnesses and documentary evidence about the profoundly miserable early childhood of the LaGrand children and the prejudice they and their mother probably faced because of Walter and Karl's biracial heritage. Had the United States properly notified the LaGrands of their Vienna Convention rights, Germany would have assisted their counsel in collecting this evidence *before the trial*, which was essential to the "preparation and presentation of the all-important sentencing-phase defense."[224]

(i) The role of mitigating evidence in U.S. death penalty litigation

4.58 In the United States, capital trials proceed in two stages. First, a trial on the merits is held to determine the defendant's guilt or innocence. If the defendant is found guilty, a sentencing hearing is held to decide the sentence to be applied.[225] Two constitutional principles inform the sentencing phase. First, under the Eighth Amendment, only individuals of sixteen years of age or older, sane, and guilty of aggravated murder as defined by statute in each state, can be executed.[226]

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[223] Brief of *Amici Curiae* Republic of Argentina, Republic of Brazil, Republic of Ecuador and Republic of Mexico in Support of Petition for a Writ of Certiorari, *Paraguay v. Gilmore*, ANNEX 48, at p. 1.

[224] L. Bilionis/R. Rosen, Lawyers, Arbitrariness, and the Eighth Amendment, 75 *Texas Law Review* (1997), p. 1315.

[225] In Arizona, the trial judge presides over the penalty phase and alone decides the sentence. In other states the jury from the merits phase also decides sentencing, or the

Second, during the sentencing phase, defendants can present any evidence which may convince the judge to impose a sentence lighter than death.[227] The state must prove aggravating evidence beyond a reasonable doubt, whereas mitigating factors must only be proved beyond a preponderance of the evidence.[228] States cannot limit the consideration of the mitigating evidence, either judicially or by statute, in such a way as to exclude it from the sentencing process.[229] The judge must balance the evidence submitted, weighing the strength and quality of the aggravating factors against the mitigating ones, in order to ensure that the personal circumstances of each defendant are considered in determining the penalty.[230]

4.59 Consideration of mitigating evidence is a "constitutionally indispensable part" of capital litigation.[231] Individualised sentencing and background

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court empanels a new jury for the sentencing phase.

[226] *Godfrey v. Georgia*, 446 U.S. 420, 427-428 (states must specifically define crimes or aggravating circumstances for which death is a possible punishment); *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (the execution of a person under 16 years of age is prohibited by the Eighth and Fourteenth Amendments); *Ford v. Wainwright*, 477 U.S. 399, 409-410 (1986) (the Eight Amendment prohibits a state from carrying out a sentence of death upon a prisoner who is insane).

[227] *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Arizona's death penalty statute includes a non-exhaustive list of aggravating and mitigating factors which may be introduced at the sentencing phase. A.R.S. § 13-703.01(A).

[228] *State v. Rogovich*, 932 P.2d 794, 800-801 (1997).

[229] *Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978).

[230] *State v. Barreras*, 181 Ariz. 516, 892 P.2d 852, 857-858 (1995).

[231] *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality); see also *Penry v. Lynaugh*, 492 U.S. 302, 328, (1989) ("in order to ensure reliability in the determination that death is the appropriate punishment in a particular case, the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime."); *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438

circumstances are critical in determining whether personal culpability should be mitigated in capital cases. The Eighth Amendment to the U.S. Constitution allows neither mandatory capital sentencing schemes nor completely discretionary sentencing schemes.[232] In order to avoid arbitrary or capricious imposition of the death sentence therefore, courts are required to evaluate any "compassionate or mitigating factors" which might reduce the individual's personal culpability.[233]

4.60 Given the gravity and irrevocability of the death penalty, the defence counsel is under a higher duty than in routine criminal trials to undertake extensive investigations into the defendant's background in order to identify and introduce all possible information which may mitigate the sentence.[234] Any aspect of a defendant's character or history or any circumstances that might entail a sentence less than death must be considered.[235] These requirements ensure that sentencing authorities have adequate information before they impose the death penalty, while preserving the basic humanity and dignity of the defendant.[236]

U.S. 586 (1978) (plurality).

[232] *McCleskey v. Kemp*, 481 U.S. 279, 304 (1987); *Lockett v. Ohio*, 438 U.S. 586, 603-605 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991 (1976).

[233] *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell and Stevens, JJ.) (holding that constitutional imposition of the death penalty depends on "consideration of the character and record of the individual offender and the circumstances of the particular offense"); see also *California v. Brown*, 479 U.S. 538, 545 (1987) (concurring opinion of O'Connor, J.); *Lockett v. Ohio*, 438 U.S. 586, 603-605 (1978).

[234] *Hendricks v. Calderon*, 864 F. Supp. 929, 944-945 (N.D. Cal. 1994), *aff'd by* 64 F.3d 1340 (9th Cir. 1995), *cert. denied*, 517 U.S. 1111 (1996); Affidavit of Scharlette Holdman, Ph.D, ANNEX 49, paras. 7, 18; J. Tomes, Damned if you do, Damned if You Don't: The Use of Mitigation Experts in Death Penalty Litigation, 24 *American Journal of Criminal Law* (1997), p. 361; L. Bilionis/R. Rosen, *supra* note 224, at p. 1317: defence lawyers must "unearth, develop, present, and insist on the consideration of those 'compassionate or mitigating factors stemming from the diverse frailties of humankind.'" (Citations omitted).

[235] *Lockett v. Ohio*, 438 U.S. 586, 604-605 (1978).

[236] Affidavit of Scharlette Holdman, Ph.D. (Mitigation Specialist with the Center for

Counsel must, therefore, prepare and introduce at sentencing a complete social history presenting the defendant's childhood and family life, from information collected from family, friends, medical and school records, and other available sources.[237] The failure to present information about a traumatic childhood, mental history, school performance and other evaluations can result in irreparable prejudice to the defendant, as it did to the LaGrands.[238] Defence counsel's efforts to provide this information can mean the difference between life and death.[239]

(ii) The absence of critical mitigating evidence in the LaGrands' cases

4.61 Without the assistance of the German Consulate, the LaGrands' attorneys were unable to present their complete social and medical histories at sentencing. Although both lawyers presented an outline of the troubled childhood of Karl and Walter LaGrand, because Germany was not involved, none of the available documentary and possible testimonial evidence of their childhood circumstances was presented.

At sentencing, each lawyer had one expert witness testify about his client's mental state and history; however, the doctors had met only briefly with each

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Capital Assistance, a non-profit organisation providing legal assistance to court-appointed counsel in capital cases involving indigent defendants), ANNEX 49, paras. 7, 10-12; J. Tomes, *supra* note 234, at p. 361 (1997).

[237] Affidavit of Scharlette Holdman, ANNEX 49, paras. 7-12; Affidavit of Robert Hirsh, Esq., ANNEX 50, paras. 10-13.

[238] *State v. Perez*, 148 Ill. 2d 168, 193; 592 N.E. 2d 984, 996 (1992); see also S. Bright, Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor when Life and Liberty are at Stake, *Annual Survey of American Law* 1997, p. 792 (describing a case where after one defendant was sentenced to death without any mitigating evidence of his mental retardation having been put before the jury, one juror read newspaper accounts saying that the defendant was mentally retarded and stated that she would not have voted for the death penalty if she had known).

[239] S. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime But for the Worst Lawyer, 103 *Yale Law Journal* (1994), p. 1837, n. 10-14 and accompanying text (discussing cases where failure to present mitigating evidence contributed to death sentences for severely retarded and mentally ill defendants).

defendant and based their entire opinions on information provided by the defendants themselves in the absence of the records in Germany corroborating and detailing the LaGrands' early childhood of abuse and neglect.[240] Thus, these expert opinions were incomplete, inadequate and not sufficiently compelling.[241]

> "An accurate social history [as presented to both the court and the experts] must be supported by independently gathered evidence from as many divergent sources as possible."[242]

4.62 Materials available at that time from state agencies in Germany indicate that the LaGrands suffered from serious physical and emotional neglect, malnutrition, illnesses and hospitalisations from infancy.[243] Criminal charges were brought against Walter and Karl's aunt for some of these incidents.[244] Walter was abandoned by his mother into his grandmother's care at birth. His grandmother was already caring for Walter's sister and his two cousins at this time, and was incapable of caring adequately for the four young children.[245] Consequently, Walter was frequently shuttled between his grandmother and state child care institutions at an early age, ultimately spending over 2½ years in state children's homes before his fifth birthday.[246] Because of such a history with his mother and siblings, Karl LaGrand was immediately placed into a children's home at birth, separated from his siblings for the first three years of his life.[247] None of this information was discovered by the LaGrands' counsel or presented to the sentencing judge.

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[240] Transcript of Aggravation-Mitigation (sentencing) Hearing, *State of Arizona v. LaGrand and LaGrand* (17 Sept. 1984), ANNEX 5.

[241] Walter LaGrand's attorney also called their half-sister to testify, but she was not asked, and probably did not recall sufficiently to testify, about the early years in Germany.

[242] Affidavit of Scharlette Holdman, ANNEX 49, paras. 10-12; Affidavit of Robert Hirsh, ANNEX 50, paras. 10-13 (commenting on inadequacy of mitigation case due in part to lack of collateral evidence); *State v. Medrano*, 185 Ariz. 192, 194, 914 P.2d 225, 226 (1996) (finding expert opinion based solely on defendant's own necessarily self-serving description insufficient to mitigate); *Hendricks v. Calderon*, 864 F. Supp. 929, 944 ff. (N.D. Cal. 1994), *aff'd by* 64 F.3d 1340 (9th Cir. 1995), *cert. denied*, 517 U.S. 1111, 134 L.Ed. 2d 485, 116 S.Ct. 1335 (1996) (granting writ of habeas corpus vacating death sentence because ineffective assistance of counsel in presenting inadequate mitigation case where, *inter alia*, no independent corroborating was presented of defendant's traumatic childhood).

[243] *State of Arizona v. Walter LaGrand*, Third Petition for Post-Conviction Relief, 2 March 1999, pp. 1-9, and exhibits 1-20, ANNEX 51.

[244] *Ibid.*

[245] *Ibid.*

4.63 Germany's assistance was crucial in obtaining the records detailing this difficult childhood. When the Consulate was finally contacted, the German Government provided the funds to hire an attorney in Germany to investigate Walter LaGrand's background. This investigation resulted in the production to Walter LaGrand's counsel of many records detailing the trauma, neglect and abuse Walter and his siblings suffered during their early years.[248]

4.64 The documents located with the assistance of the German Government in 1993, while critical to establishing mitigating factors at sentencing, only scratch the surface of the evidence Germany could have assisted in uncovering for the LaGrands before trial. Witness testimony from family, friends, social workers and caretakers could have been sought, and possibly located, to supplement the documents detailing Walter and Karl's early years of abandonment, malnutrition, hospitalisation and foster care. It is undeniable that an effort to locate the potential witnesses would have been more promising in 1983, when the LaGrands were on trial for their lives. Had proper notification been given under the Vienna Convention, competent trial counsel certainly would have looked to Germany for assistance in developing this line of mitigating evidence.

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[246] *Ibid.*

[247] *Ibid.*

[248] Not only was this information vitally important in and of itself, but it was because of vital statistics located in these records that subsequent counsel for Walter LaGrand was able to locate his father and step-father and obtain affidavits from them containing additional mitigating evidence. Affidavit of Kelley Henry, ANNEX 52, para. 4.

4.65 There are compelling reasons to believe that the LaGrands' sentences would have been reduced had the evidence about their traumatic childhood, hospitalisations and racial isolation in Germany been presented. Evidence of dysfunctional family backgrounds and childhood neglect can be critical in the individualised sentencing process.[249] Arizona courts have held that a difficult family background that affects or impacts on a defendant, rendering his behaviour beyond his control, is a relevant mitigating circumstance.[250] In *State v. Trostle*, for example, the Supreme Court of Arizona reduced a death sentence to life imprisonment after evaluating evidence of early childhood abuse and neglect.[251] The court found that the long term damage of childhood abuse and the absence of a stabilising family were relevant mitigating factors because they impaired the defendant's ability to conform his conduct to the law. Indeed, any evidence of mental impairment or behaviour disorders may be relevant in mitigating capital punishment.[252]

4.66 Had the information from Germany been available during the LaGrands' trial, it would have been provided to the expert witnesses for evaluation of the probable consequences of such profound physical and emotional childhood suffering and its detrimental effect on the LaGrands behaviour as young adults.[253] This psychological evidence would have been important, *inter alia*, in supporting the argument made in post-conviction proceedings that Karl LaGrand had impulsive personality disorder, an important mitigating argument to prove that the murder was not premeditated.[254] The evidence regarding physical and emotional trauma as infants would also have led to additional medical and psychological opinions not offered at sentencing because the experts were unaware of the background. Of course, this evidence would also have been submitted directly to the court to corroborate the opinions of the experts and the descriptions the defendants and their sister offered of their childhood.[255]

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[249] Affidavit of Scharlette Holdman, ANNEX 49, para. 8.

[250] *State v. Wallace*, 773 P.2d 983, 986 (1989), *cert. denied*, 494 U.S. 1047 (1990).

[251] 951 P.2d 869, 884-86 (1997).

[252] *State v. Richmond*, 886 P.2d 1329, 1338 (1994) (death sentence reduced to life imprisonment because of mitigating evidence of defendant's mental disorder and changed character while in prison); see also *State v. Mauro*, 766 P.2d 59, 69 (1988) (defendant's mental disorder was a "sufficiently substantial" mitigating circumstance to reduce death sentence).

[253] Affidavit of Robert Hirsh, Esq., ANNEX 50, paras. 10-13; Affidavit of Scharlette Holdman, ANNEX 49, paras. 11-12.

4.67 Finally, because of the nature of the crime for which the LaGrands were convicted – essentially a bungled bank robbery – theirs was a case where a proper case for mitigation is likely to influence the judge and result in a sentence less than death.[256] Whereas a serial killer or a criminal convicted of an especially heinous murder is not likely to receive leniency as a result of mitigating evidence regarding the effects of a traumatic childhood, the LaGrands' crime was of a different magnitude. Indeed, the police officer who had taken the confession of Karl LaGrand told the Federal Public Defender's office that the LaGrand case had

> "always disturbed him because, in all of his years of experience as a law enforcement officer, and in his experience investigating many violent crimes, he has never considered this particular crime to warrant the death penalty."[257]

In sum, the United States' violation of the Vienna Convention prevented the LaGrands' attorneys from accessing information that could have proved decisive in preventing their death sentences.

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[254] Memorandum of Law in Support of the Petitioner's Writ of Habeas Corpus (8 March 1993), ANNEX 46, at pp. 23 ff., 106 ff., 130 and Appendix Exhibit I, Affidavit of Dr. Timothy J. Derning.

[255] For importance of corroborating mitigation evidence see sources cited *supra* note 242.

[256] Affidavit of Kelley Henry, ANNEX 52, para. 6.

[257] Affidavit of Jeannette Laura Sheldon (3 March 1999), ANNEX 53, para. 6.

(4) The United States' violation of the Vienna Convention prevented Germany from obtaining effective trial counsel for its nationals.

4.68 The failure of the LaGrands' trial attorneys to present mitigating evidence from Germany at sentencing reveals another prejudice resulting from the United States' violation of the Vienna Convention: inadequate counsel. Had Germany been afforded its rights under the Vienna Convention, it would have assisted its nationals in obtaining effective, experienced counsel, either by providing funds or by persuading better counsel to take on these cases pro bono. Instead, the LaGrands were subjected to the inadequate legal representation of court-appointed lawyers *neither of whom had ever represented a client accused of capital murder*.

(i) The importance of competent, experienced counsel in U.S. death penalty litigation

4.69 Capital litigation in the United States is highly specialised and highly complex. Only competent counsel can navigate it successfully and avoid the death penalty for their clients.[258]

> "Every step – whether it be one of the countless pressure points before and during trial, such as plea bargaining, pretrial investigation, motion practice, jury selection, development and presentation of a guilt-phase defense, preparation and presentation of the all-important sentencing-phase defense, jury instructions, final argument, or any one of the umpteen instances when preservation of one of the defendant's various legal rights requires action; or whether it be one of the critical moments on appeal, when issues are identified, conceptualized, and melded into a coherent whole – presents opportunities for success (and conversely, for failure) that depend directly on the relative strength or weakness of the lawyer's performance."[259]

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[258] See *McFarland v. Scott*, 512 U.S. 1256, 1256 (1994) (dissenting opinion of Blackmun, J.) (describing capital cases as "more costly and difficult to litigate than ordinary criminal trials"); S. Bright, *supra* note 239, at pp. 1839 f., 1859, 1863.

[259] Bilionis/Rosen, *supra* note 234, at pp. 1315 (emphasis added).

> Capital defence, therefore, requires an experienced advocate – one aware of the many Constitutional issues, able to activate safeguards, challenge inappropriate decision-making by judges, opposing counsel and legislators, and preserve all rights and claims for the lengthy appeals process that follows every death sentence.[260]

4.70 In the United States, indigent defendants, like the LaGrands, are most likely to have ineffective lawyers and thus are disproportionately likely to receive death sentences.[261] Indeed, poverty and inadequate counsel are, however unjustly, the two "key variables" determining whether capital punishment is sought, imposed and carried out.[262] Instead of receiving the protection and assistance of their country to obtain competent counsel, the defence of the LaGrands was in the hands of changing court-appointed attorneys in the Arizona criminal justice system, whose performance left much to be desired.[263] The disparity in the quality of such random representation has been the subject of heavy critique and loud calls for reform from scholars, practitioners and jurists alike.[264]

4.71 The need for effective counsel at the trial phase cannot be overemphasised. As Supreme Court Justice Blackmun explained in dissent from *McFarland v. Scott*:

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[260] See Bilionis/Rosen, *ibid.*, at pp. 1316 ff.; Bright, *supra* note 239.

[261] Leroy D. Clark, All Defendants, Rich and Poor, Should Get Appointed Counsel in Criminal Cases: The Route to True Equal Justice, 81 *Marquette Law Review* (1997), pp. 48 f.; Bright, *supra* note 234, at p. 1835.

[262] Clark, *supra* note 261, at p. 50; Bright, *supra* note 234.

[263] Even U.S. courts held that view; see, *e.g.*, *State v. LaGrand*, 733 P.2d, ANNEX 4, at p. 1069.

[264] Bilionis/Rosen, *supra* note 234, at pp. 1304 ff., n. 13 ff. (listing articles by scholars, students, capital defenders, jurists and journalists re ineffective counsel for capital defendants); Bright, *supra* note 234, at p. 1835, n. 10-14 and accompanying text; Panel Discussion: The Death of Fairness? Counsel Competency and Due Process in Death Penalty Cases, 31 *Houston Law Review* (1994), p. 1105.

> "[The American] system of justice is adversarial and depends for its legitimacy on the fair and adequate representation of all parties at all levels of the judicial process. The trial is the main event in this system, where the prosecution and the defense do battle to reach a presumptively reliable result. When we execute a capital defendant in this country, we rely on the belief that the individual was guilty, and was convicted and sentenced after a fair trial, to justify the imposition of state-sponsored killing."[265]

4.72 For foreign nationals facing the death penalty, the Vienna Convention right to consular notification and assistance "without delay" is fundamental, because if the consulate cannot assist with obtaining adequate counsel at the "main event", its assistance is often moot. The LaGrand Case amply demonstrates the potentially lethal consequences of poor trial representation for capital defendants.

> "Evidence not presented at trial cannot later be discovered and introduced; arguments and objections not advanced are forever waived. Nor is a capital defendant likely to be able to demonstrate that his legal counsel was ineffective, given the low standard for acceptable attorney conduct and the high showing of prejudice required"

by constitutional law.[266] In other words, Germany's intervention at any stage later than the trial phase would be unlikely to remedy the extreme prejudice created by the counsel appointed to represent the LaGrands, for two reasons. First,

> "[e]ven the best lawyers cannot rectify a meritorious constitutional claim that has been procedurally defaulted or waived by prior inadequate counsel."[267]

Second, the only remedies for constitutionally ineffective counsel in U.S. law are at the post-conviction stage, where the standard for constitutionally competent trial counsel is so absurdly low, that even had the LaGrands' lawyers been drunk, unconscious or physically absent from their trials (let alone ignorant of the law), they would not have received relief and an opportunity for a new, properly conducted trial.[268] These two constitutional legal doctrines, of restricted postconviction relief on the one hand, and of extreme standards for ineffective assistance on the other, form the "pernicious vicegrip" described by Supreme Court Justice Thurgood Marshall which traps capital defendants subjected to profoundly inadequate legal representation.[269]

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[265] 512 U.S. 1256 (1994) (dissenting opinion of Blackmun, J.); Bright, *supra* note 234, at p. 1837 (calling "competent representation by counsel" the "most fundamental component of the adversary system").

[266] *McFarland v. Scott, ibid.*, at p. 1259; Bright, *supra* note 234, at pp. 1837, 1862.

(ii) The LaGrands' ineffective trial counsel

4.73 The record is replete with evidence of the ineffective advocacy of the LaGrands' attorneys. Their failure to seek or present mitigating evidence from Germany was discussed above. In addition, there was ample, additional mitigating evidence available here in the United States, which they also never endeavoured to find or present. In particular, the lawyers never attempted to contact Walter or Karl's mother, father, step-father. Nor did they do any investigation into Walter and Karl's many stays at foster homes and state children's agencies in the United States, although considerable, important documentary and testimonial evidence was readily available.

4.74 In 1999, the Federal Public Defender located both Walter's biological father, Tirso Molina Lopez, and his step-father, Masie LaGrand, and obtained affidavits from them.[270] Their testimony contained important information

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[267] *McFarland v. Scott*, *ibid.*, at p. 1263.

[268] *Ibid.*, at pp. 1259-61; Bright, *supra* note 238, at pp. 789 ff., 829 ff. (describing cases of drunk, dishonest and unconscious capital defence lawyers); Bright, *supra* note 239, at p. 1835 f. (describing case where woman sentenced to death for killing her abusive husband was represented by an attorney who appeared in court so intoxicated that he was sent to jail in contempt of court; the next morning both attorney and client were produced from the jail, and the trial recommenced).

[269] Justice T. Marshall, Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit, 86 *Columbia Law Review* (1986), pp. 3 f.

[270] Affidavit of Kelley Henry, ANNEX 52, para. 4.

about Walter and Karl's mother, Emma Gebel, and her attitude toward her children. Mr. Molina described how Emma often seemed depressed, and drank during her pregnancy.[271]

Mr. LaGrand provided extensive information about Emma and the boys. For instance, though Emma did tell Mr. LaGrand about Karl, she never told him until after their marriage that she had two older children as well.[272] Mr. LaGrand also said that when Karl was very young

> "he appeared shaky, abnormal and seemed to suffer from some sort of involuntary shaking of his head."[273]

Mr. LaGrand also stated that when the family returned from Germany, Mr. LaGrand sent Karl to live with his mother (Karl's step-grandmother) in Alabama for a year. Mr. LaGrand stated that he wanted Karl under his mother's care because he was very young, too young for school, and that he "noticed a positive change in Karl, an improved and better attitude" during the time he spent with his step-grandmother.[274] Finally, Mr. LaGrand described in detail the continuing emotional and physical neglect to which Emma Gebel subjected her two sons. She was "often verbally abusive" to the boys and "seemed completely unconcerned about the welfare of her two sons."[275] By contrast, she took relatively good care of and clearly favoured her daughter, Patricia.[276] Mr. LaGrand stated that he

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[271] Affidavit of Tirso Molina Lopez, ANNEX 54, paras. 18, 20-23.

[272] Affidavit of Masie LaGrand, ANNEX 55, paras. 6, 9.

[273] *Ibid.*, para. 7.

[274] *Ibid.*, para. 13.

[275] *Ibid.*, para. 11.

[276] *Ibid.*, paras. 11 ff.

> "always believed that the constant verbal abuse from Patricia, Emma, and the glaring absence of love and concern from their mother was terribly harmful to the boys."[277]

Similarly, upon being contacted by the Federal Public Defender's Office in March 1999, Walter's foster mother provided a declaration describing how Walter had been deprived of the love of a mother and father and how he had behaved like a normal teenager while living with her family.[278] Several social workers who had worked with Walter also offered to write declarations. They all stated that they would have done so in 1984, as well. Indeed, one of the social workers "appeared upset that he had not been contacted sooner."[279] Other available evidence, including records from the children's homes was collected in just several days by the Federal Public Defender and presented in Walter's third petition for state post-conviction relief.[280]

4.75 In 1993, Karl's *habeas* counsel tracked down considerable evidence from similar sources, including many psychological evaluations from the Youth Opportunity Unlimited and VisionQuest boys homes where Karl spent several years. This information, detailing the extent to which Karl's mental and emotional state had been disturbed and affected by his abusive, disruptive and unloving family, was submitted it with Karl's first *habeas* petition.[281] *Habeas* counsel also interviewed Karl's foster parents and his mother, who provided information about the physical abuse Karl and Walter's step father had inflicted on them.

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[277] *Ibid.*, para. 13.

[278] Declaration of Pansy Shields, 2 March 1999, ANNEX 56.

[279] Declaration of Ada I. Berrios, 2 March 1999, ANNEX 57, para. 6.

[280] *Ibid.* (listing the background records she was able to obtain on Walter LaGrand, including 16 pages of assessment and evaluation reports from social workers at VisionQuest Youth Placement Facility; 75 pages of assessment and evaluation reports from Arizona Boys Ranch; 9 pages of high school records and transcripts).

[281] Memorandum of Law in Support of the Petitioner's Writ of Habeas Corpus, 8 March 1993, ANNEX 46, Appendix Exhibit N (lodged with the Court).

Significantly, Karl's *habeas* lawyer also provided this newly-obtained information to the expert who had testified for Karl at his sentencing hearing.[282] With the benefit of this newly-provided information, which would have been readily available prior to Karl's trial and sentencing, the expert came up with a dramatically different diagnosis, one that provided further mitigating evidence.[283]

4.76 The LaGrands' trial counsel never even looked for any of this critical, easily locatable evidence, which together with the information collected from Germany clearly showed not only the LaGrands' intolerable home life but, importantly also indicated that when the boys were away from their mother and their miserable home life, they did better, did not act out and were well liked.[284] Of course, none of this evidence was presented to either expert testifying about Walter and Karl's mental and emotional profile, thereby seriously impeding, if not preventing entirely, these experts from providing any useful testimony at sentencing. Because background evidence of a traumatic childhood is considered mitigating to the extent it affects the defendant's behaviour as an adult, investigation into these areas and proper preparation of the expert witnesses was essential to establishing a credible, compelling case at sentencing.

4.77 Trial counsel's legal representation was fatally inadequate in other ways as well: Walter's lawyer failed to investigate adequately his innocence claims, for instance, by failing to discredit the only witness contradicting Walter and

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[282] *Ibid.*, Appendix Exhibit I, Affidavit of Dr. Timothy J. Deming, p. 4 (listing interview with Emma LaGrand as one of the documents he reviewed); Third Petition for Post-Conviction Relief, 2 March 1999, ANNEX 51, Exhibit 2 (Barstow interview).

[283] Memorandum of Law in Support of the Petitioner's Writ of Habeas Corpus, 8 March 1993, ANNEX 46, at pp. 23 ff., 106 ff., 130 and Appendix Exhibit I, Affidavit of Dr. Timothy J. Deming.

[284] *Ibid.*, Appendix Exhibit N (YOU and VisionQuest record), lodged with the Court; Third Petition for Post Conviction Relief, 2 March 1999, ANNEX 51, Exhibit 2 (Barstow interview); Shields Affidavit, ANNEX 56, paras. 3 ff., 9 f.; LaGrand Affidavit, ANNEX 55; paras. 13 f.

Karl's consistent accounts that Karl acted alone in committing the murder, and neglecting to hire an independent crime scene investigator to review the physical evidence. He also failed to investigate Karl's mental health background which would have supported a claim that Karl acted alone and impulsively, thereby rendering Walter completely ineligible for the death penalty.[285] Then upon appeal and post-conviction, Walter's lawyer failed to have his client consult with an independent counsel to investigate an ineffective assistance claim.[286]

Karl's counsel was equally inadequate. The Arizona Supreme Court, while not finding his performance to be constitutionally ineffective, agreed that he was not a zealous advocate for his client, saying that he had kept an "exceedingly low profile."[287] Karl's lawyer failed to interview any witnesses; he did not hire an independent investigator; he only asked questions of 2 out of 18 witnesses who testified at trial. And, as discussed above, he put on virtually no case for mitigation at sentencing, having failed completely to investigate Karl's background and properly prepare his expert witness.[288] Indeed, Karl's trial lawyer subsequently acknowledged his inadequacies and stated that he should have done many things differently.[289]

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[285] In the trial of the LaGrand brothers, the jury received instructions on felony murder, which requires that defendant either be the killer or be an active participant in the killing to receive death, and first degree murder, which requires premeditation. The jury returned a general verdict, not indicating under which crime it had convicted. If the crime was committed impulsively by Karl alone, then under either charge Walter was not eligible for the death penalty.

[286] Memorandum of Law in Support of the Petitioner's Writ of Habeas Corpus, 8 March 1993, ANNEX 46; Third Petition for Post-Conviction Relief, 2 March 1999, ANNEX 51, at pp. 9 f.

[287] *State v. LaGrand*, 733 P.2d 1066, 1068 (1987).

[288] Memorandum of Law in Support of the Petitioner's Writ of Habeas Corpus, 8 March 1993, ANNEX 46.

[289] *Ibid.*, Appendix Exhibit B (Affidavit of David Gerson).

4.78 All of these instances of incompetent lawyering resulted in death sentences for Karl and Walter LaGrand that could have been avoided if the United States had merely abided by its obligations under the Vienna Convention. For had Germany been promptly notified of the LaGrands' situation, it would have arranged for competent counsel to represent the brothers. Competent counsel would have investigated the cases thoroughly at the trial stage, as subsequent counsel finally did. And, it would have made all the difference.

Germany wants to emphasise that it has not presented all this evidence in order to bring the United States justice system to trial in this forum. Rather, since the United States itself claims that "prejudice" needs to be shown, Germany wants to establish that "prejudice" indeed occurred as a consequence of the omission of consular advice to the LaGrand brothers.

4.79 United States domestic law, as applied to the case of the LaGrand brothers, has not met the requirements of Art. 36 (2) of the Vienna Convention: Although the brothers were undeniably prejudiced by the lack of consular assistance – and, ultimately, their death sentence was due to the breaches of Art. 36 (1) of the Convention by authority of the Respondent –, U.S. domestic law did not provide any remedy for these violations of the Convention. Thus, U.S. domestic law did not, to repeat once again the respective wording of Art. 36 (2),

> "enable full effect to be given to the purposes for which the rights accorded under this article are intended."

d) The particular responsibility of the sentencing State in death penalty cases

4.80 Given the gravity and irrevocability of the death penalty, the sentencing State is under a particular, higher duty to most carefully weigh and examine the negative impact and consequences of a violation of the rights granted by the Vienna Convention on Consular Relations to foreign nationals. This higher standard of responsibility must apply to the full and proper examination of all relevant aspects of the proceedings affected by the violation in question with regard to, in particular, the decisive phase of sentencing. Again, taking into account the gravity and irrevocability of the death penalty, the necessary careful scrutiny must address in particular the questions of:

- if and to what extent the violation of the Vienna Convention prevented the defendant from seeking and obtaining consular assistance,
- if and to what extent the violation prevented assistance by competent and effective counsel, experienced in death penalty litigation, and
- if and to what extent the violation prevented essential mitigating evidence from being presented during sentencing.

4.81 Germany submits that in our concrete case U.S. authorities, instead of recognising and living up to this particular responsibility connected with the death penalty, unfortunately chose another, wholly inappropriate course of action: They chose to apply in a persistent and rigorous manner certain rules of U.S. domestic law, in particular the rule of "procedural default", whose effect was that no remedy was available to the LaGrand brothers. The authorities did so in full knowledge that Karl and Walter LaGrand had been unaware of their rights under the Vienna Convention at the time of the earlier proceedings, and that they had been unaware of their rights precisely because the Arizona authorities had failed to comply with their obligations under the Convention to inform them of those rights without delay.

It was this deplorable attitude in disregard of the United States' obligations under the Vienna Convention, despite the obviousness of the violation committed and sustained over a long period, which eventually barred any relief and led to the execution of Karl and Walter LaGrand.

e) Conclusion

4.82 For the reasons thus given, Germany submits that the United States has violated the notification requirement contained in Art. 36 (1) of the Vienna Convention on Consular Relations. If the United States had abided by this obligation and promptly notified Germany of the situation of the LaGrand brothers, Germany would have arranged for competent counsel to represent them and helped in the preparation of their defence. Thus, their case would have been thoroughly investigated at the trial stage of the criminal proceedings, and essential mitigating evidence mainly located in Germany would have been presented during the sentencing phase. There are compelling reasons to believe that the LaGrands' sentences would have been reduced had this evidence been introduced. Hence, the lack of consular advice was decisive for the infliction of the death penalty.

4.83 Further, the United States has violated Art. 36 (2) of the Vienna Convention because it has not provided any effective remedy against its violation of the notification requirement. Rather, certain rules of U.S. domestic law, in particular the rule of "procedural default", made it impossible for the LaGrand brothers to successfully raise this violation subsequent to their conviction in the Arizona courts – a circumstance which ultimately led to their execution.

4.84 The requirement of "prejudice" under domestic law is not in line with Art. 36 (2). But even if it were held otherwise, the law of the United States still does not meet the requirements of Art. 36 (2) because it does not provide effective remedies even in the face of such prejudice as in the case of the LaGrand brothers.

4.85 The United States did not prevent the execution of Karl and Walter LaGrand irrespective of German demands. By thus making irreversible its earlier breaches of Art. 5 and 36 (1) and (2) and causing irreperable harm, the United States violated its obligations under international law.

II. Violations of the rights of aliens resulting from the breaches of the Vienna Convention

4.86 By not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36 (1) (b) of the Vienna Convention on

Consular Relations, the United States has not only violated its treaty obligations to Germany in the latter's own right, but also injured Germany *indirectly* through its failure to accord to German nationals in the United States the treatment to which they were entitled under international law.

1. The law of diplomatic protection

4.87 According to the rules of international law on diplomatic protection, Germany is also entitled to protect its nationals with respect to their right to be informed upon their arrest, without delay, of their rights under Art. 36 (1) (b) of the Vienna Convention, respectively to the consequences of the omission of such advice. As *Oppenheim's International Law* explains:

> "Although aliens fall under the territorial supremacy of the state they enter, they nevertheless remain – as is recognised in Art. 3.1(b) of the Vienna Convention on Diplomatic Relations 1961 – under the protection of their home state. This right of a state to protect its nationals abroad provides the means whereby it may enforce the duty of other states to treat aliens on their territory in accordance with certain legal rules and principles. The failure of a state to treat aliens on its territory in accordance with its international obligations will involve that state's international responsibility."[290]

4.88 This view is confirmed by United States practice and doctrine. Thus, the influential *Restatement of the Foreign Relations Law of the United States* provides in § 711:

> "A state is responsible under international law for injury to a national of another state caused by an official act or omission that violates
>
> (a) ...;
>
> (b) a personal right that, under international law, a state is obligated to respect of individuals of foreign nationality; ...

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[290] R. Jennings/A. Watts (eds.), *Oppenheim's International Law*, vol. I (9th ed. 1992), p. 934.

> (c) ... ."[291]

4.89 These opinions are based on a longstanding jurisprudence both of the present Court and of its forerunner. In one of its earliest judgments, the Permanent Court of International Justice declared:

> "It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law."[292]

As the International Court of Justice explained in the *Barcelona Traction* Case:

> "When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them."[293]

According to this jurisprudence, the rules on diplomatic protection rest on a double basis:

> "The first is that the defendant State has broken an obligation towards the national State in respect of its nationals. The second is that only the party to whom an international obligation is due can bring a claim in respect of its breach."[294]

4.90 Thus, all these pronouncements agree on two conditions for the exercise of diplomatic protection. First, the violation of an individual right provided by international law. Second, the existence of a bond of nationality between the State exercising its right to diplomatic protection and the individual whose rights were violated. As the Permanent Court has explained,

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[291] *Restatement of the Law (Third), The Foreign Relations Law of the United States* (1987), vol. 2, p. 184.

[292] *Mavrommatis Palestine Concessions, Judgment, P.C.I.J., 1924, Serie A, No. 2*, p. 12.

[293] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970*, p. 32 (para. 33).

[294] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, pp. 181f.; confirmed in *Barcelona Traction*, *supra* note 293, at p.

> "it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection".[295]

In the present Case, Germany has already established the existence of the bond of nationality between itself and the LaGrand brothers,[296] as well as the breach of Art. 36 (1) (b) of the Vienna Convention on Consular Relations by the United States. In the following, Germany will demonstrate that Art. 36 (1) (b) provides an individual right to German nationals. The breach of this right in the case of the LaGrand brothers entails the right of Germany to the exercise of diplomatic protection on behalf of its nationals.

2. The right to consular advice as an individual right of foreign nationals

4.91 Under international law, a State has a broad measure of discretion in its treatment of aliens. However, this discretion is not unlimited. It is, *inter alia* and above all, subject to the treaty obligations of the State concerned, such as the obligations under the Vienna Convention on Consular Relations.[297] As Germany will prove, the right to be informed upon arrest of the rights under Art. 36 (1) (b) of the Vienna Convention does not only reflect a right of the sending State (and home State of the individuals involved) towards the receiving State but also is an individual right of every national of a foreign State party to the Vienna Convention entering the territory of another State party. As will be set out, this interpretation does not only follow from the

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32 (para. 35).

[295] *Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, p. 16; confirmed in *Barcelona Traction*, *supra* note 293, at 33 (para. 36).

[296] See *supra* Part Three, Ch. V. 3.

wording, the drafting history and subsequent general State practice concerning the Vienna Convention, but also corresponds to the bulk of U.S. practice and jurisprudence.

a) Interpretation of Article 36 (1) (b) of the Vienna Convention

4.92 According to the jurisprudence of the International Court of Justice, the most important means of interpretation of a treaty is the text of the treaty itself:

> "[I]n accordance with customary international law, reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties, a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. Interpretation must be based above all upon the text of the treaty. As a supplementary measure recourse may be had to means of interpretation such as the preparatory work of the treaty and the circumstances of its conclusion."[298]

4.93 The wording of Art. 36 (1) (b) firmly supports the view that Art. 36 creates an individual right for nationals of the sending State. The last sentence of Art. 36 (1) (b) does not speak of obligations of the receiving State only, but also of "rights" of the person arrested or detained. By stating that it is for the arrested person to decide whether consular notification is to be provided – and not for the authorities of the receiving State or the consular post of the sending State – the Convention puts the foreign individual in the "driver's seat", as it were. This reading is confirmed by Art. 36 (1)(c) of the Convention, according to which the national arrested or detained in the receiving State may refuse any action on his or her behalf which may be taken by his or her consulate against his or her will. Finally, para. 2 of Art. 36 refers to the "rights referred to in paragraph 1", presupposing that it is individual rights Art. 36 (1) is dealing with.

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[297] *Oppenheim's International Law*, *supra* note 290, p. 905.

[298] *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, pp. 21 f. (para. 41), quoted also in *Maritime Delimitation and Territorial Questions between Qatar and Bahrein, Jurisdiction and Admissibility, Judgment, I.C.J. Reports*

4.94 When analysing the object and purpose of a treaty, recourse to the preamble of the instrument can help to identify the contracting parties' intentions in drafting the treaty.[299] In the Supreme Court proceedings in *Breard*,[300] the United States advanced the view that Preambular Paragraph 6 of the Vienna Convention stands in the way of a direct application of Art. 36 of the Convention in domestic proceedings. The Preambular Paragraph referred to states that, in the view of the States parties,

> "the purpose of such [i.e., consular] privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States".

However, the U.S. argument is based on a misunderstanding of the relationship between Art. 36 of the Vienna Convention and the cited passage of the Preamble. The Vienna Convention outlines, among other things, the functions, privileges, and immunities of consuls. Paragraph 5 of the Preamble clarifies that these privileges and immunities do not grant individual rights to the individual consul, but rights to the sending state which the latter may waive at any time. Paragraph 5 speaks of "privileges" and "immunities" and of consular "functions". This language refers to specific articles of the Convention granting privileges and immunities to consular personnel (*e.g.*, Art. 29, 32, 33, 35, 40, 41, 49, 50, 52 concerning privileges, and Art. 43 concerning immunity) or spelling out consular functions. Whereas these Articles use terms such as "privilege" or "immunity", which are usually referred to as "the consular privileges and immunities",[301] Art. 36 of the Vienna Convention is neither concerned with a "privilege" nor with an "immunity". Therefore, Preambular Paragraph 6 does not refer to Art. 36 but rather to those provisions of the Convention that confer privileges and immunities on the consul, his or her family or staff, and on the premises of the consulate itself.

1995, p. 18 (para. 33)

[299] Apart from the passages quoted in note 298, *cf. Rights of Nationals of the United States of America in Morocco, Judgment of August 27th, 1952, I.C.J. Reports 1952*, p. 196 .

[300] 1997 U.S. Briefs 1390, ANNEX 34, at p. 37.

4.95 Furthermore, it is hard to imagine how an individual detained in a foreign State covered by Art. 36 could "abuse" his or her rights under that convention. Thus, Paragraph 6 of the Preamble of the 1963 Vienna Convention simply makes no sense if interpreted to apply to the rights of individuals. It makes perfect sense, however, if understood to relate to privileges and immunities *ex officio*. Therefore, the passage in the Preamble discussed here does not in any way limit the right granted to the individual foreign national.

4.96 A comparison with other treaties on diplomatic or consular relations reveals that the terms "privileges" and "immunities" usually refer to the rights that consuls/ diplomats possess *because of their function as the sending States' representatives*.[302] The Preamble of the Vienna Convention on Diplomatic Relations of 18 April 1961,[303] in a sense the forerunner of the Vienna Convention on Consular Relations, contains a similar phrase.[304] A resolution adopted by the Diplomatic Conference of 1961 on that matter accordingly focuses on the possibility of a waiver of immunities for civil claims.[305]

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[301] *Oppenheim's International Law*, *supra* note 297, at pp. 1143 ff.

[302] *Cf.* Art. IV, Sect. 14 of the UN Convention on the Privileges and Immunities of the United Nations, 1 UNTS, p. 15; 90 UNTS, p. 327 (corr.):

> "Privileges and immunities are accorded to the representatives of Members not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with the United Nations."

[303] 18 Apr. 1961, 500 UNTS, p. 96 (1964).

[304] "*Realizing* that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States, ...".

[305] Resolution II, Consideration of Civil Claims, adopted by the United Nations Conference on Diplomatic Intercourse and Immunities on Apr. 14, 1961, 500 UNTS, pp. 218 ff. (1964); also in: *United Nations Conference on Diplomatic Intercourse and Immunities. Official Records*, vol. II, UN Doc. A/CONF.20/14/Add. 1, at p. 90. The resolution reads:

> "*The United Nations Conference on Diplomatic Intercourse and Immunities*,
> *Taking note* that the Vienna Convention on Diplomatic Relations adopted by the Conference provides for immunity from the jurisdiction of the

Recalling paragraph 4 of the Preamble to the 1961 Vienna Convention on Diplomatic Relations (which is identical to the wording of Preambular Paragraph 6 of the 1963 Vienna Convention on Consular Relations), the resolution confirms that diplomatic immunity should not be used to shield consuls from the consequences of their wrongdoings or to frustrate civil claims brought against them in the courts of the receiving State. This supports the view that by excluding the exercise of individual rights in the Preambles of the 1961 and 1963 Vienna Conventions, States were aiming at preventing consular or diplomatic agents from taking personal profit from their status. However, this rationale does not apply to the object and purpose of Art. 36 (1)(b) of the 1963 Vienna Convention, because this Article does not deal with privileges granted *ex officio* at all but with rights of "ordinary" foreign nationals not exercising any official function. Paragraph 6 of the Preamble to the 1963 Vienna Convention therefore does not determine the object and purpose of Art. 36 of the Convention.

b) Travaux préparatoires of the Vienna Convention on Consular Relations

4.97 As already pointed out,[306] the *travaux préparatoires* may clarify the purpose of Art. 36 (1) (b) even further. We will first turn to the discussion of the issue of

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> receiving State of members of the diplomatic mission of the sending State,
> *Recalling* that such immunity may be waived by the sending State,
> *Recalling further* the statement made in the preamble to the convention that the purpose of such immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions,
> *Mindful* of the deep concern expressed during the deliberations of the Conference that claims of diplomatic immunity might, in certain cases, deprive persons in the receiving State of remedies to which they are entitled by law,
>
> *Recommends* that the sending State should waive the immunity of members of its diplomatic mission in respect of civil claims of persons in the receiving State when this can be done without impeding the performance of the functions of the mission, and that, when immunity is not waived, the sending State should use its best endeavours to bring about a just settlement of the claims."

[306] See *supra* note 159.

consular advice and notification in the International Law Commission, and, following that, to the proceedings of the 1963 Vienna Conference.

(1) Discussions within the ILC (1960-1961)

4.98 From the very beginning of the ILC's debate on what was to become the future Art. 36, Commission members were aware of the fact that by including such an article, they would codify an individual right. The ILC draft articles still foresaw an obligation of the receiving State to automatically notify the sending State's consular officer of the detention of its nationals. During the Vienna Conference, after some discussions, this obligation was amended to become an obligation of notification *upon request of the detainee*. Nevertheless, the debates within the ILC show that the Commission proceeded from the assumption that foreign nationals do possess an individual right to contact their consul.

Art. 30A, as proposed by Special Rapporteur Sir Gerald Fitzmaurice, read:

> "In order to facilitate the exercise of the consul's function of protecting the nationals of the sending State resident or present within his district.
>
> (a) A consul shall have complete freedom of communication with and access to such nationals, and correspondingly they shall have complete freedom of communication with the consul, and also (unless subject to lawful detention) of access to him.
>
> (b) The local authorities shall inform the consul of the sending State without delay when any national of that State is detained in custody within its district ... ."[307]

As Mr. Milan Bartos observed in the deliberations of the International Law Commission, Art. 30 A "was intended to safeguard human rights ..."[308]. And further:

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[307] *Yearbook of the International Law Commission* 1960, vol. I, p. 42 (para. 1).

[308] *Ibid.*, p. 46 (para. 28).

> „A code such as the Commission was preparing was an integrated whole and in its definition of the consular functions the human rights of a foreigner could not be ignored, for it was precisely one of the consul's functions to protect those rights of his nationals."[309]

Mr. George Scelle

> "agreed with Mr. Bartos "that the protection of individual and human rights was one of the consular functions."[310]

And Mr. Douglas Edmonds (from the United States) observed:

> "[T]he protection of human rights by consuls in respect of their nationals should be the primary consideration for the Commission."[311]

Speaking at the 13th session in 1961, Mr. Edmonds called the right of a foreigner to communicate with the consulate of his or her home state "a very fundamental human right".[312]

4.99 Members of the ILC critical of a right of communication were opposed to such a right precisely because it involved a human right, which, in their view, had no place in a convention on consular relations. For Mr. Jaroslav Zourek, the right to communication went

> "beyond what seemed to him the proper province of consular law and had impinged upon such matters as human rights...".[313]

4.100 Taken together, these statements strongly indicate that the members of the ILC were well aware of the specific character of the proposed right of communication of nationals with the consulates of their home States as a full-fledged human right, as opposed to the privileges and immunities dealt with in the other parts of the Commission's draft. It was precisely this specific nature of what later was to become Art. 36 which guided their work.

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[309] *Ibid.*, p. 50 (para. 23).

[310] *Ibid.*, p. 51 (para. 25).

[311] *Ibid.*, p. 47 (para. 41).

[312] *Yearbook of the International Law Commission* 1961, vol. I, p. 33 (para. 16).

[313] *Yearbook of the International Law Commission* 1960, vol. I, p. 50 (para. 20).

(2) Discussions at the Vienna Conference on Consular Relations

4.101 At the Vienna Conference of 4 March to 22 April 1963, consensus on the future Art. 36 was reached only at the last minute. The reason for the division of opinions lay in the question of whether or not the provision ought to embody a duty of automatic notification (as proposed by the ILC) or of notification upon request. The view that the article contained a right pertaining to the individuals concerned remained unchallenged, however.

For instance, the Spanish delegate to the Conference, Mr. Perez Hernandez, remarked that

> "[t]he right of the nationals of a sending State to communicate with and have access to the consulate and consular officials of their own country, established by the International Law Commission's draft, was one of the most sacred rights of foreign residents in a country."[314]

The delegate of India, Mr. Das Gupta, emphasised that

> "the right given to consulates implied a corresponding right for nationals."[315]

This right was also asserted by the delegate of the Republic of Korea, Mr. Chin. According to him,

> "the receiving State's obligation under [Art. 36] paragraph 1 (b) was extremely important, because it related to one of the fundamental and indispensable rights of the individual."[316]

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[314] *United Nations Conference on Consular Relations, Official Records*, vol. I, UN Doc. A/Conf.25/16, p. 332 (para. 36).

[315] *Ibid.*, p. 333 (para. 50).

[316] *Ibid.*, p. 338 (para. 11).

The Tunisian delegate, Mr. Bouziri, argued in favour of the final version of Art. 36 by pointing to the adequate safeguard of both individual freedom and the exercise of consular functions.[317]

4.102 Various States submitted amendments to the ILC draft criticising the proposed automatic notification of the receiving State upon detention of a foreign national. Instead, most of these States favoured such an obligation only upon request of the detained individual. This, of course, strengthened the "human rights element" in Art. 36 since the will of the person concerned was rendered more important. The obligation to inform the detainee of his options also gained additional weight.

4.103 What is relevant in our context is that during the 1963 Vienna Conference, the Respondent in the present case was one of the leading sponsors of a modification of the ILC draft away from automatic notification. Thus, the United States proposed an amendment to Art. 36 making the notification of an arrest to the consulate dependent upon the request of the foreign national concerned.[318] As the U.S. delegate, Mr. Blankinship, explained in the Second Committee,

> "[t]he object of the amendment was to protect the rights of the national concerned."[319]

In the plenary, he added:

> "In its present form [without the amendment] the draft of Art. 36 ... did not recognize the freedom of action of the detained persons ... "[320]

According to the French delegate, Mr. de Menthon,

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[317] *Ibid.*, p. 82 (para. 58).

[318] UN Document A/CONF.25/C.2/L.3, in: *United Nations Conference on Consular Relations, Official Records*, vol. II, UN Doc. A/Conf.25/16/Add. 1, p.73.

[319] *United Nations Conference on Consular Relations, Official Records*, vol. I, UN Doc. A/Conf.25/16, p. 337 (para. 39).

[320] *Ibid.*, p. 38 (para. 21).

> "the amendment affirmed one of the fundamental rights of man – the right to express his will freely."[321]

Some States were opposed to this amendment. In their view, making notification dependent upon request would weaken the protection of the individual in Art. 36 who often would not know of his or her right to have the consulate notified of his or her arrest or detention. Thus, these delegations were also concerned with the rights of the individual derived from that provision. These concerns were justified to a large extent because, at the time, the article did not yet contain a clause requiring the local authorities to inform the detainee of his or her rights as finally provided in Art. 36.

4.104 A concern that the national might be ignorant of his or her right was expressed by several delegates. For instance, Mr. Dadzie from Ghana was of the opinion

> "that the (mentioned) amendment involved a risk: a national of the sending State ... might not know that his consulate should be notified, and might therefore fail to request notification."[322]

The Soviet delegate, Mr. Konzhukov, asked:

> "What guarantee was there that the person concerned had been informed of his right...?"[323]

4.105 Finally, a few days before the end of the 1963 Conference, several countries submitted a proposal to amend the ILC version of Art. 36, containing no obligation of automatic notification but rather providing for notification of the consulate only upon request of the detainee.[324] The United Kingdom submitted, again, an amendment to that proposal, requiring the local authorities to inform the detainee of his rights.[325] To justify this amendment, the delegate of the United Kingdom, Mr. Evans, stated that:

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[321] *Ibid.*, p. 38 (para. 24).

[322] *Ibid.*, p. 36 (para. 8).

[323] *Ibid.*, p. 37 (para. 13).

[324] UN Doc. A/CONF.25/L.49, in: *United Nations Conference on Consular Relations, Official Records*, vol. II, UN Doc. A/Conf.25/16/Add.1, p. 171.

> "The language of the [first-mentioned proposal] was unacceptable as it stood, because it could give rise to abuses and misunderstanding. It could well make the provisions of article 36 ineffective because the person arrested might not be aware of his rights. ... For those reasons, ... it was essential to introduce a provision to the effect that the authorities of the receiving State should inform the person concerned without delay of his rights ... ."[326]

The amendment of the United Kingdom was accepted by 65 votes to 2 (13 abstaining).

4.106 States opposing the version of Art. 36 thus adopted did so because they were of the opinion that a provision conveying a human right had no place in the Convention. Thus, the representative of Kuwait, Mr. Sayed Mohammed Hosni, remarked that, in his opinion,

> "the International Law Commission's text introduced a novelty to the convention by defining the rights of the nationals of the sending States and not, as stated in paragraph 1 of the commentary, the rights of consular officials. ... As representative of a country with many aliens on its territory, he fully believed in the rights of nationals of sending States and was against restricting them; but they were irrelevant to the convention under discussion."[327]

The Venezuelan delegate, Mr. Perez-Chiriboga, argued in favour of the deletion of the reference to individual rights, explaining that

> "the draft convention was not the appropriate instrument" [to codify rights and duties of nationals].[328]

Due to strong opposition, Venezuela finally dropped its proposal to delete the paragraph.[329]

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[325] UN Doc. A/CONF.25/L.50, *ibid.*

[326] *United Nations Conference on Consular Relations, Official Records*, vol. I, UN Doc. A/Conf.25/16, pp. 83 f. (para. 73).

[327] *Ibid.*, p. 332 (para. 37).

[328] *Ibid.*, p. 333 (para. 51).

4.107 The statements thus reproduced demonstrate a remarkable consensus among the representatives of a great number of States from different regions of the world. Even States opposing the codification of rights of individual nationals in the Convention agreed that the proposed Article did precisely this – stipulate individual rights. But the overwhelming majority was of the opinion that international law had reached a stage where a codification of consular law could not proceed without a norm providing for individual rights of foreign nationals. In the words of the delegate of Greece, Mr. Spyridakis, by providing an individual right, the Conference

> "was also following the present-day trend of promoting and protecting human rights, for which future generations would be grateful."[330]

c) The UN Declaration on the human rights of aliens

4.108 Other international instruments support this view. Art. 10 of the United Nations Declaration on the human rights of individuals who are not nationals of the country in which they live, which was adopted by UN General Assembly Resolution 40/144 on 13 December 1985,[331] also guarantees the freedom of communication for a foreign national with the consulate of his or her home State:

> "Any alien shall be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national or, in the absence thereof, with the consulate or diplomatic mission of any other State entrusted with the protection of the interests of the State of which he or she is a national in the State where he or she resides."

Thus, according to this Declaration, the right of access to the consulate of the home State, as well as the information on this right, is the right of any alien,

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[329] *Ibid.*, p. 334 (para. 2).

[330] *Ibid.*, p. 339 (para. 13).

[331] *General Assembly, Official Records*, Supplement No. 53, Resolutions and Decisions,

that is of "any individual who is not a national of the State in which he or she is present" (Art. 1 of the Declaration). The Declaration stresses the close link between the rights of aliens to consular assistance and human rights.

4.109 This link also becomes apparent from the drafting history of the Declaration. During the *travaux préparatoires* in the ECOSOC and within a Working Group charged with the elaboration of what was to become GA Res. 40/144, various Governments referred to the close relationship between Art. 10 of the resolution and Art. 36 of the Vienna Convention on Consular Relations. For instance, the Japanese Government favoured the inclusion of the words "in accordance with the provisions of Art. 36 of the Vienna Convention on Consular Relations" in the text of Art. 10.[332] Similarly, the Norwegian Government pointed to the fact that (the final) Art. 10 of the Declaration and Art. 36 of the Vienna Convention contain the same right.[333]

4.110 General Assembly Resolution 40/144 is not legally binding upon States. But an analysis *lege artis* must not stop there. As this Court has noted in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*,

> "General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character."[334]

UN Doc. A/40/53, p. 253.

[332] Reply to the Secretary-General concerning the question of the international legal protection of the human rights of individuals who are not citizens of the country in which they live, UN Doc. A/40/638/Add.2, at p. 3. See also UN Doc. A/C.3/40/12, p. 27, para. 124 for a similar Japanese proposal.

[333] UN Doc. E/CN.4/1354, p. 19.

[334] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 254 f. (para. 70).

Whereas the specific resolutions referred to in the Advisory Opinion had been adopted with a considerable number of negative votes and abstentions, our Declaration was adopted by consensus, without a single vote against or any abstention. Nevertheless, even in the case of the General Assembly resolutions concerning nuclear weapons, the Court did accord these resolutions considerable weight in interpreting the relevant law on the matter. As the International Criminal Tribunal for the Former Yugoslavia explained with regard to the United Nations Declaration on Torture of 9 December 1975,[335]

> "[i]t should be noted that this Declaration was adopted by the General Assembly by consensus. This fact shows that no member State of the United Nations had any objection to such definition. In other words, all the members of the United Nations concurred in and supported that definition."[336]

The use of the label "Declaration" is additional proof to the fact that the General Assembly considered the contents of Resolution 40/144 as particularly significant.

4.111 Second, irrespective of whether the Declaration as such is legally binding or not, it certainly constitutes "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" in the terms of Art. 31 (3) (b) of the 1969 Vienna Convention on the Law of Treaties, which is generally considered to be an expression of customary law on the matter.[337] Therefore, the declaration is important evidence of *opinio*

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[335] Declaration on the Protection of all Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by United Nations General Assembly resolution 3452 (XXX) of 9 Dec. 1975.

[336] *Prosecutor v. Furundzija*, Judgment of 10 December 1998, Case No. IT-95-17/1-T (1998), reprinted in: 38 *International Legal Materials* (1999), p. 317, at p. 351 (para. 160).

[337] See *supra* note 298 and accompanying text. On the use of subsequent practice for the interpretation of treaties by the Court, see *Corfu Channel Case, Judgment of April 9th, 1949, I.C.J. Reports 1949*, p. 25: "The subsequent attitude of the Parties shows that it was not their intention, by entering into the Special Agreement, to preclude the Court from fixing the amount of the compensation." See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*

juris and international practice on the character of Art. 36 (1) (b) of the 1963 Vienna Convention on Consular Relations as embodying an individual right of aliens on foreign territory.

d) Recognition of the individual right to consular advice by United States domestic law

4.112 The foregoing analysis is supported by United States jurisprudence and practice. In the process of obtaining the consent of the U.S. Senate to the ratification of the 1963 Vienna Convention, the Administration declared that the Convention was self-executing, that is, directly applicable in internal law without the need for any implementing legislation. In the words of the Deputy Legal Adviser of the U.S. Department of State, Mr. J. Edward Lyerly, the treaty was

> "entirely self-executive [*sic*] and does not require any implementing or complementing legislation."[338]

4.113 Obviously, the international legal obligations of the United States do not depend on the question whether a treaty is self-executing pursuant to United States internal law or not.[339] In the United States Government brief to the Supreme Court in the *Breard* Case, the U.S. Solicitor General asserted that the Convention was self-executing but did not provide for an individual right:

> "The United States agrees that the Vienna Convention is self-executing, in the sense that it can be implemented by government

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notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 22 (para. 22); I. Sinclair, *supra* note 159, pp. 137 f., with further references.

[338] Remarks in Hearings before the Senate Committee on Foreign Relations, S. Exec. Rep. No. 91-9, 91st Cong. 1st Sess. 2 & 5 (appendix) (1969), cited according to W. Aceves, *supra* note 152, p. 268.

[339] For the relationship between U.S. domestic law and international law generally, see, *e.g.*, *Restatement of the Law (Third), The Foreign Relations Law of the United States* (1987), § 115 (1) (b): "That a rule of international law or a provision of an international agreement is superseded as domestic law does not relieve the United States of its international obligation or of the consequences of a violation of that obligation."

> officials without implementing legislation. That issue is distinct from the question whether the Convention creates enforceable rights that may be raised and adjudicated in a particular judicial setting."[340]

But the self-executing character of the Convention as a whole, and that of the right provided in Art. 36 (1) (b), is strong evidence that U.S. law itself regards the right to consular advice as an individual right and not as a mere reflex of a duty incumbent on the United States Government.

4.114 In its brief to the Supreme Court, the U.S. Government cited one of the leading U.S. experts in the field, Professor Carlos Manuel Vázquez, to the effect that Art. 36 (1) (b) was not enforceable by individuals.[341] Indeed, Professor Vázquez was right in pointing out that the question of the self-executing character of a treaty and that of a right of action pursuant to a treaty provision are "analytically distinct".[342] However, the reference to Professor Vázquez' article by the U.S. Government is misleading, because in a footnote, Professor Vázquez then explains that

> "[t]he standing issue is closely related to the right-of-action issue."[343]

In an earlier article on the subject, Professor Vázquez had gone into further detail:

> "In treaty cases, therefore, an important factor in determining whether a private right of action should be 'implied' under a treaty that does not expressly confer one is whether failure of the courts to afford the remedy would produce (or exacerbate) the international responsibility of the United States to the state of the individual's nationality. If it would, a private right of action to obtain that

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[340] 1997 U.S. Briefs 1390, ANNEX 34, at p. 17 n. 4.

[341] *Ibid.*

[342] C. Vázquez, The Four Doctrines of Self-Executing Treaties, 89 *American Journal of International Law* (1995), p. 721.

[343] *Ibid.*, at p. 722 n. 135.

remedy under domestic law should be considered to be implicit in the treaty."[344]

As Germany will argue in detail later, [345] the violation of the right to information on consular access under Art. 36 (1)(b) of the Vienna Convention does indeed entail the international responsibility of the State concerned.

4.115 Professor Vázquez further argues that a right of action is not necessary if a self-executing provision is used as a defence, e.g. in a criminal case, or if national law provides for a right of action on its part, which is also the case in criminal proceedings:

> "Defendants relying on a treaty as a defense to a criminal prosecution (or claiming that the treaty governs the conditions of their confinement) do not need a 'private right of action,' as they are not seeking to maintain an action."[346]

Thus, the arguments of Professor Vázquez support rather than contradict Germany's interpretation of Art. 36 (1) (b) of the 1963 Vienna Convention as establishing an individual right.

4.116 The U.S. Supreme Court itself has also clearly expressed the connection between the self-executing character of a provision and enforcement by courts:

> "The Extradition Treaty has the force of law, and if, as respondent asserts, it is self-executing, it would appear that a court must enforce it on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation." [347]

4.117 Notwithstanding the opinion of the Federal Government during the ratification process that the Vienna Convention was self-executing, the United States incorporated the obligation of consular notification at the request of the detained person in the Code of Federal Regulations, which is to be applied by federal offices and agencies but not by state and local authorities. § 50.5 (a) (1) of Title 28 of the Code reads:

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[344] C. Vázquez, Treaty-Based Rights and Remedies of Individuals, 92 *Columbia Law Review* (1992), p. 1157.

[345] See Part Six of the present Memorial.

[346] C. Vázquez, The Four Doctrines of Self-Executing Treaties, *supra* note 342, at pp. 719 ff. (citation at p. 721, footnotes omitted).

[347] *U.S. v. Alvarez-Machain*, 504 U.S. 655, 667 (1992).

> "In every case in which a foreign national is arrested the arresting officer shall inform the foreign national that his consul will be advised of his arrest unless he does not wish such notification to be given. If the foreign national does not wish to have his consul notified, the arresting officer shall also inform him that in the event there is a treaty in force between the United States and his country which requires such notification, his consul must be notified regardless of his wishes and, if such is the case, he will be advised of such notification by the U.S. Attorney." [348]

Similar provisions can be found in the Immigration Regulations. Thus, Section 236.1 (e) of the Code of Federal Regulations provides that

> "[e]very detained alien shall be notified that he or she may communicate with the consular or diplomatic officers of the country of his or her nationality in the United States." [349]

Thus, U.S. federal law provides for the very right to consular information whose existence as an individual right the U.S. government is denying in the present case. However, as explained above, the provisions in U.S. federal law cannot be of help to those detainees who are detained in State criminal proceedings which are not regulated by federal law.

4.118 Several U.S. courts have recognised that Art. 36 (1) (b) of the Vienna Convention provides for an individual right. This jurisprudence was established in cases dealing with federal agencies not subject to the law of the individual states. For instance, according to the U.S. 9th Circuit Court, the immigration regulations mentioned above were intended to implement U.S. obligations stemming from the Vienna Convention and therefore served the benefit of the individual alien. As the Court explained,

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[348] 28 C.F.R. Section 50.5, 32 Fed. Reg. 5619 (1967) (concerning arrest and detention by federal officers).

[349] 8 C.F.R. Section 236.1 (e), 32 Fed. Reg. 1040 (1967); amended 62 Fed. Reg. 10312, 10360 (1997)

> "the regulation itself must serve a purpose of benefit to the alien. ... [T]he particular regulation involved here, 8 C.F.R. § 242.2(e) (1979), serves such a purpose. It was intended to insure compliance with this country's treaty obligations to promote assistance from their country of origin for aliens facing deportation proceedings in the United States."[350]

Only recently, in the case of *United States v. Lombera-Camorlinga*, the 9th Circuit Court unequivocally confirmed this jurisprudence. Because of the clarity and the quality of its reasoning, the decision deserves to be cited at length:

> "The government, however, reasons that the right violated by the customs officers belonged not to the appellant, as an individually affected foreign national, but rather to the Mexican Consulate. Based on this reasoning, the government contends that the appellant lacks standing to complain of the violation. We disagree.
>
> While one of the purposes of Article 36 is to 'facilitat[e] the exercise of consular functions relating to nationals of the sending State,' Convention, art. 36(1), foreign nationals are more than incidental beneficiaries of Article 36(1)(b). The treaty language itself clearly states that the rights enumerated in sub-paragraph 36(1)(b) belong to the foreign national: 'The said authorities shall inform the person concerned without delay of his rights under this sub- paragraph.' Convention, Article 36(1)(b) (emphasis added). It strains the English language to interpret 'his rights' in this context to refer to the Consulate's rights. We held in United States v. Rangel-Gonzales, 617 F.2d 529, 532 (9th Cir.1980), that '[t]he right established by the regulation [intended to ensure compliance with the Convention] and in this case by treaty is a personal one.'
>
> Moreover, the language of the provision is not precatory, but rather mandatory and unequivocal. See INS v. Cardoza-Fonseca, 480 U.S. 421, 441, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1986) (contrasting mandatory obligations and 'precatory' provisions under the United Nations Protocol Relating to the Status of Refugees). Accordingly, individual foreign nationals have rights under Article 36(1)(b) of the Vienna Convention.

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[350] *U.S. v. Rangel-Gonzales*, 617 F.2d 529, 530 (1980); referring to *U.S. v. Calderon-Medina*, 591 F.2d 529 (1979), at 531, para. 3 and note 6. But see *Waldron v. INS*, 17 F.3d 511, 518 (1993) (denying that Art. 36 (1) (b) constitutes "any underlying fundamental constitutional or statutory right.")

> The government further contends that, even if the Vienna Convention establishes individual rights, individuals do not have standing to enforce those rights. This contention lacks merit.
>
> It has long been recognized that, where treaty provisions establish individual rights, these rights must be enforced by the courts of the United States at the behest of the individual. See United States v. Rauscher, 119 U.S. 407, 418- 19, 7 S.Ct. 234, 30 L.Ed. 425 (1886) (citing Head Money Cases, 112 U.S. 580, 5 S.Ct. 247, 28 L.Ed. 798 (1884)); see also United States v. Alvarez- Machain, 504 U.S. 644, 659-60 (1992) (recognizing the continuing authority of Rauscher). Because Article 36(1)(b) establishes individual rights, these rights must be enforced by our courts."[351]

4.119 Thus, an analysis of United States law and jurisprudence convincingly shows that Art. 36 (1) (b) constitutes an individual right both under the domestic law of the United States and according to the interpretation of the Vienna Convention by U.S. courts. Regrettably the U.S. courts have not applied these holdings to the (in)applicability of the doctrine of procedural default and related doctrines limiting access to federal courts, in order to enforce these individual rights.

3. Conclusion

4.120 Both under international and U.S. domestic law, Art. 36 (1) (b) of the Vienna Convention provides for an individual right of foreigners – a right which the United States has violated in the case of the LaGrand brothers. According to the law of diplomatic protection, this conduct is in breach of the right of the State of which the LaGrands were nationals. Therefore, Germany

> "is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels."[352]

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[351] *U.S. v. Lombera-Camorlinga*, 170 F.3d 1241, 1242 f. (9th Cir. 1999).

[352] *Mavrommatis*, *supra* note 292.

III. Non-observance by the United States of the Order on Provisional Measures of 3 March 1999

1. Introduction

4.121 In executing Walter LaGrand, the United States acted contrary to a binding order of this Court and breached its obligations under Art. 94 (1) of the United Nations Charter and Art. 41 (1) of the Statute of the International Court of Justice.

The conduct of the United States was not only impermissible under international law but also showed a lack of respect for the authority of the International Court of Justice. Even though the Respondent has never gone as far as to deny the authoritative character of orders on provisional measures before this Court itself, it has refrained from taking the required steps to implement the specific Order in question.

2. Orders indicating Provisional Measures are binding on the parties

4.122 Provisional Measures indicated by the International Court of Justice are binding by virtue of the law of the United Nations Charter and the Statute of the Court. A reasonable interpretation of the applicable norms inevitably leads to this result, which is the only one permitting the Court to efficiently carry out the tasks entrusted to it, and permitting the Provisional Measures to fulfil their function by preserving the rights of both parties. Indeed, as Judge Weeramantry put it:

> "An interpretation which imposes anything short of a binding legal obligation upon the Respondent is out of tune with the letter and spirit of the Charter and the Statute."[353]

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[353] *Application of the Convention on the Prevention and Punishment of the Crime of*

4.123 Like the preceding *Breard* Case, the present Case is a telling example of why an indication of Provisional Measures must be regarded as binding. Walter LaGrand has lost his life as a result of the deliberate conduct of the authorities of the United States. Therefore, the Court is deprived of the possibility of rendering a Judgment on the basis of Germany's original Application.

4.124 The question of the existence of a machinery for the enforcement of Orders indicating Provisional Measures has not to be dealt with in the present context. Therefore, no conclusions can be drawn from the fact that the Charter contains an express provision on enforcement only with regard to Judgments of the International Court of Justice. As Judge Weeramantry has pointed out in the *Genocide* Case:

> "Whether such an order is complied with or not, whether it can be enforced or not, what other sanctions lie behind it – all these are external questions, not affecting the internal question of inherent validity."[354]

a) The principle of institutional effectiveness

4.125 First of all, any discussion of the legal character of Provisional Measures must take into account that the Court is a judicial body whose task it is to reach a decision in a case brought before it on the basis of the equality of parties. This presupposes that the object of the dispute must remain free from unilateral interference during the entire course of the proceedings. Therefore it must be part of the authority of an international tribunal to take the necessary steps to ensure that the subject of the litigation is preserved until the final judgment is rendered. As to its source, the power to indicate interim measures can be deduced from a general principle of law reflecting the procedural laws of a great number of national legal systems.[355] In light of this, could there be any

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Genocide, Provisional Measures, Order of 13 September 1993, Sep. Op. Weeramantry, I.C.J. Reports 1993, p. 389.

[354] Sep. Op. Weeramantry, *supra* note 353, p. 374.

[355] A. Tanzi, Problems of Enforcement of Decisions of the International Court of Justice

basis for maintaining that the International Court of Justice in particular, the principal judicial organ of the United Nations, were the exception and did not possess such competence inherent in the judicial function?

4.126 It would be contradictory, on the one hand, to grant the Court jurisdiction to decide a case, and, on the other, not to provide it with the necessary means to fulfil this task. To quote Judge Ajibola:

> "Logic and common sense would consider it ridiculous and absurd for the Court to be unable to preserve the rights of the parties pending the final judgment."[356]

And in the words of Judge Weeramantry:

> "The view that provisional orders are part of the inherent authority of a judicial tribunal is ... one which is sustainable on general principle, on practical necessity, and on the basis of a not inconsiderable body of authority. Principles that may be invoked in support of such a view include the principle of equality of parties, the principle of effectiveness, the principle of non-anticipation by unilateral action of the decision of the Court, and also the wide and universal recognition of the enjoining powers of courts as an inherent part of their jurisdiction."[357]

If procedural orders were not binding, the Court could not work efficiently but would always remain dependent on the good will of the parties. Such a construction can hardly be reconciled with the position of this Court as the principal judicial organ of the international community. As Edvard Hambro has stated:

> "It would not be in conformity with the august character of the Court as an 'organ of international law' and as the 'principal judicial organ

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and the Law of the United Nations, 9 *European Journal of International Law* (1998), p. 569. See also B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953), pp. 267 ff.

[356] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, Sep. Op. Ajibola*, I.C.J. Reports 1993, p. 399.

[357] Sep. Op. Weeramantry, *supra* note 353, p. 379.

> of the United Nations'... to make any decision that the parties were free to respect or ignore according to their own pleasure."[358]

4.127 This Court has an invaluable function in the peaceful settlement of disputes and the development of international law. In order to effectively fulfil its tasks, it must possess the necessary instruments. To once more quote Judge Weeramantry:

> "To view the Order made by the Court as anything less than binding so long as it stands would weaken the régime of international law in the very circumstances in which its restraining influence is most needed."[359]

b) Procedural prerequisites for the adoption of Provisional Measures

4.128 Another factor speaking in favour of the binding force of Provisional Measures is the procedural framework within which such measures are adopted. The Court has developed a detailed jurisprudence as to the prerequisites for a Provisional Measure.[360] It balances the interests of the parties with utmost scrutiny, and refrains from issuing the requested measure if it holds that *prima facie* the rights to be protected or its jurisdiction do not exist or that there is no danger of an irreparable damage. Why should the Court be so cautious if it was acting at an exhortatory, recommendatory level only? In the words of Sir Hersch Lauterpacht:

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[358] E. Hambro, The Binding Character of the Provisional Measures of Protection Indicated by the International Court of Justice, in: W. Schätzel/ H.-J. Schlochauer (eds.), *Rechtsfragen der Internationalen Organisation. Festschrift für Hans Wehberg* (1956), pp. 165 ff., whom Judge Weeramantry cites with approval, Sep. Op., *supra* note 353, at p. 378.

[359] Sep. Op. Weeramantry, *ibid.*, at p. 389.

[360] J. Merrills, Interim measures of protection in the recent jurisprudence of the International Court of Justice, 44 *International and Comparative Law Quarterly* (1995), pp. 90 ff.

> "It cannot be lightly assumed ... that the Court weighs minutely the circumstances which permit it to issue what is no more than an appeal to the moral sense of the parties."[361]

And, as Judge Ajibola put it:

> "[W]hat is the point of giving a request for an indication of provisional measure [sic] urgent attention, a quick and immediate hearing and priority ..., if in spite of all the effort put into it, the resulting order is to be considered not legally binding and ineffective?"[362]

c) Binding force of Provisional Measures as a necessary corollary to the binding force of the final judgment

4.129 As a logical result of the binding force of the final judgment, Provisional Measures have to be considered as binding as well. Once a jurisdictional link is established, an applicant is entitled to a binding judgment. The respondent has no possibility to withdraw its consent to pending proceedings. The applicant's right to a final, binding decision on the merits must receive adequate protection by equally binding Provisional Measures. If withdrawal of consent is not permissible, it cannot be reasonably assumed that a State could be allowed to obtain the same result by action frustrating the opponent's claim.

As the representative of the United Kingdom, Sir Gladwynn Jebb, pointed out in the Security Council in connection with the non-compliance with a Provisional Measure indicated by the Court in the *Anglo-Iranian Oil* Case:

> "[C]learly, there would be no point in making the final [judgment] binding if one of the parties could frustrate that decision in advance by actions which would render the final judgment nugatory. It is, therefore, a necessary consequence ... of the bindingness of the final

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[361] H. Lauterpacht, *The Development of International Law by the International Court* (1958), p. 254.

[362] Sep. Op. Ajibola, *supra* note 356.

> decision that the interim measures intended to preserve its efficacy should equally be binding."[363]

4.130 In fact, Art. 59 and 60 of the Statute of the Court would be substantially weakened if it were open to the parties to negate the final decision by action taken in advance. In the words of a commentator:

> "A provision that the final judgment is binding becomes pointless if that decision can be negatived [sic] by actions of one of the parties in advance of the judgment."[364]

It would seem to follow, therefore, from the binding force of final Judgments that interim measures, intended to ensure the effectiveness of those final decisions, are of equally binding character.

4.131 As a general rule applying to judicial settlement of disputes at the national as well as the international level, if the final decision is binding, an interim measure must be regarded as binding, too.[365] Such symmetry is to be presumed, and wherever the situation is to be different, clear indications must exist in this regard, *e.g.*, the use of a formula such as "the Court may bring to the attention of the parties desirable measures". But otherwise, what will apply is a general rule to the effect that whenever a final Judgment is binding, the Provisional Measures will be binding as well.

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[363] United Nations, *Official Records of the Security Council*, Sixth Session, 559th Meeting, p. 20, Document S/PV 559 (1951).

[364] E. Nantwi, *The Enforcement of International Judicial Decisions and Arbitral Awards in Public International Law* (1966), p. 153

[365] Many authors have based their argument as to the binding force of Provisional Measures on the binding force of the final judgment; see, for example, A. El Ouali, *Effets juridiques de la sentence internationale* (1984), pp. 99 f.; A. W. Ford, *The Anglo-Iranian Oil Dispute of 1951 – 1952* (1954), p. 93; J. Stone, *Legal Controls of International Conflicts* (1954), p. 132; Tanzi, *supra* note 355, at pp. 568 f.

d) Article 94 (1) of the United Nations Charter establishes an obligation to comply with Provisional Measures

4.132 Apart from general considerations, the legal character of Provisional Measures results from express legal provisions.

Under Art. 94 (1) of the United Nations Charter, all parties to a dispute before this Court undertake to comply with its decisions. Admittedly, the second paragraph of that provision deals with Judgments only. But it is hardly conceivable that in one provision reference would be made to the same notion by using two different words. In legal texts, recourse to two different words generally implies two differing underlying concepts. It is thus widely accepted that the term "decision" includes both Judgments and Provisional Measures: it refers to all decisions of the Court regardless of their form.[366] The Court itself has treated Provisional Measures as decisions, as is demonstrated by Articles 74 (2), 76 (1) and 76 (3) of the Statute.[367]

This argument has been emphasised by the United States itself in the *Hostages* Case:

> "Iran had formally undertaken, pursuant to Article 94, paragraph 1, of the Charter of the United Nations, to comply with the decision of the Court in this case to which Iran might be is a party. Accordingly it was the hope and expectation of the United States that the Government of Iran, in compliance with its formal commitments and obligations, would obey any and all Orders and Judgments which might be entered by this Court in the course of the present litigation."[368]

4.133 In the view of J. Sztucki, Art. 94 (1) does not confer binding force on Provisional Measures; rather, the terms "decision" and "judgment" are to be seen as synonyms.[369] In his view, the two paragraphs of Art. 94 simply use the same language as Art. 59 of the Statute ("binding decision") and nobody ever claimed that this provision was applicable to Provisional Measures. However, logic as well as an analysis of the object and purpose of Art. 94 must lead to the opposite result.

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[366] S. Rosenne, *The Law and Practice of the International Court of Justice* (3d ed. 1997), vol. 1, p. 216; Sep. Op. Weeramantry, *supra* note 353, at pp. 383 ff.

[367] Sep. Op. Weeramantry, *ibid.*, at p. 383.

[368] *United States Diplomatic and Consular Staff in Tehran (United States v. Iran), I.C.J. Pleadings* 1980, p. 266 (statement of Robert Owens).

e) Article 41 (1) of the Statute of the Court establishes an obligation to the same effect

4.134 An additional basis for the obligation to comply with Provisional Measures is to be found in Article 41 (1) of the Statute. Pursuant to this provision,

> "[t]he Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."

Some commentators have taken the view that the language used in this provision is merely precatory. However, this argument is not valid:

4.135 An interpretation of the provision according to the law of treaties clearly demonstrates that Provisional Measures do have binding force. Pursuant to Art. 31 (1) of the Vienna Convention on the Law of Treaties, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the treaty's object and purpose.

4.136 First of all, any interpretation must bear in mind that the Statute is a treaty, that is, a legal instrument creating rights and obligations for the parties. The provisions of treaties are normally of a legal character, and binding as a matter of law. If a treaty prescribes duties, the rule is that these duties will be legal instead of purely moral. Of course, the parties are free to include non-binding provisions in a treaty as well, but this is the exception rather than the rule. Thus, normally, if a treaty prescribes that the parties must behave in a particular manner, it establishes a mandatory obligation. To quote Sir Hersch Lauterpacht once again:

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[369] J. Sztucki, *Interim Measures in the Hague Court* (1983), p. 289.

> "It cannot be lightly assumed that the Statute of the Court – a legal instrument – contains provisions relating to any merely moral obligations of States"[370].

(1) Ordinary meaning

4.137 As for the ordinary meaning of the terms used, the terminology used in Art. 41 (1) implies a binding character.

Thus, the use of the word "power", which in normal parlance denotes the capability to demand compliance, provides a strong argument for the obligatory character of the provision. If the Court were only supposed to deliver exhortatory advice, it would not need "power" to do so. Since it cannot be presumed that the Statute contains useless and unnecessary provisions, Art. 41 (1) must go beyond the sphere of non-bindingness. In the words of Judge Weeramantry:

> "One cannot see the Statute as solemnly investing the Court with special power under Article 41 if the sole object of that power was to proffer non-binding advice, which the parties were perfectly free to disregard. A word with such heavy connotations as 'power' must clearly have been meant to give the Court an authority it did not otherwise have – an authority to impose on parties an obligation which, without such a word, would not be binding on them."[371]

Hence, by virtue of Article 41, which vests the Court with a special power, the indicated Measures possess binding force.

4.138 The word "ought to" connotes an obligation and can have no other meaning when used in the context of the activities of a court. Moreover, it has to be seen in context with its reference to "rights" – which implies a corresponding duty – and the "power" of the Court mentioned before.[372]

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[370] Lauterpacht, *supra* note 361, at p. 254.

[371] Sep. Op. Weeramantry, *supra* note 353, at p. 382.

4.139 Finally, "indicate" is an expression of the judicial function of the Court, that is, "to *point out* what the parties must do in order to remain in harmony with what the Court holds to be the law."[373] Moreover, the term "indicate" must not be regarded in isolation, but in connection with "if the circumstances so *require*", which is indicative of a compulsory character as well.[374]

The reluctance to use a stronger formula can be explained as follows:

> "The term *indicate*, borrowed from treaties concluded by the United States with China and France on September 25, 1914, and with Sweden on October 13, 1914, possesses a diplomatic flavor, being designed to avoid offense to the susceptibilities of states. It may have been due to a certain timidity of the draftsmen. Yet it is not less definite than the word *order* would have been, and it would seem to have that effect ... An indication by the Court under Article 41 is equivalent to a declaration of an obligation contained in a judgment, and it ought to be regarded as carrying the same force and effect."[375]

Thus, the language used was not intended to deprive Provisional Measures of binding force but to stress the caution and wariness expected from the Court in the exercise of its powers.[376]

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[372] Sep. Op. Weeramantry, *ibid.*, at p. 380 f.

[373] E. Dumbauld, *Interim Measures of Protection in International Controversies* (1932), p. 169 (emphasis in original, footnotes omitted).

[374] V. Mani, Interim Measures of Protection: Article 41 of the I.C.J. Statute and Article 94 of the UN Charter, 10 *Indian Journal of International Law* (1970), p. 365: "Most naturally 'circumstances' can never require if the final judgment is not going to be of any effect and if it has to face a *fait accompli* by the time it is pronounced." Nantwi, *supra* note 364; Stone, *supra* note 365, p. 132; Tanzi, *supra* note 365, p. 569.

[375] M. Hudson, *The Permanent Court of International Justice, 1920 – 1942* (1943), pp. 425 f. (emphasis in original, footnotes and internal quotation marks omitted). See also V. S. Mani, *supra* note 374, pp. 359, 365; C. Crockett, The Effects of Interim Measures of Protection in the International Court of Justice, 7 *California Western International Law Journal* (1977), pp. 348, 354.

[376] Report of the Advisory Committee of Jurists, in: P.C.I.J., Procès-Verbaux of the Proceedings of the Committee, June 16- July 24th, 1920, p. 735; Mani, *supra* note 374,

4.140 Another explanation for the language will be that in many cases it might be appropriate for the Court, under Art. 41 of its Statute, to limit itself to indicating broad directions and leaving the selection of the most appropriate means of implementation to the concerned State itself. Thus, the language is illustrative of the co-operation between the Court and the States in this field.[377]

(2) Context

4.141 The context within which Art. 41 (1) operates undoubtedly indicates the binding force of Provisional Measures. First of all, Art. 92 ff. of the UN Charter and the Statute of the Court as a whole have to be taken into account. What is at stake is not the functioning of any dispute settlement body, but the position of the principal judicial organ of the United Nations, the World Court, whose task is to decide legal disputes in judicial proceedings. The Statute is the statute of a Court, not of an advisory body. The Court has always been very cautious to maintain its judicial character. It held that it may only act where a judgment

> "can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations"[378].

On the other hand, it has refused to give a judgment

> "which would be dependent for its validity on the subsequent approval of the parties".[379]

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p. 365.

[377] M. Addo, Interim Measures of Protection for Rights under the Vienna Convention on Consular Relations, to be published in 10 *European Journal of International Law* (1999), Number 4, ANNEX 58, p.17.

[378] *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, I.C.J. Reports 1963*, p. 34.

[379] *Ibid.*, p. 29 quoting *Free Zones of Upper Savoy and the District of Gex, Judgment, P.C.I.J., 1932, Series A/B. Nr. 46*, p. 161.

If we apply this jurisprudence to Provisional Measures, if they were construed as non-binding, they *would* be dependent on the parties' approval and not affect existing rights and obligations.

Moreover, Art. 41 (1) has to be seen in connection with the obligation to comply with Provisional Measures arising under Art. 94 (1) of the Charter, which has been mentioned above.

4.142 A further argument in favour of the binding force of Provisional Measures can be supplied by reference to Art. 78 of the Rules of Court, which empowers it to

> "request information from the parties on any matter connected with the implementation of any provisional measures it had indicated".

As Judge Ajibola observed, this is a strong argument in favour of the binding force of interim measures:

> "This is a clear indication that the Court is not expected to give any order in vain."[380]

4.143 Finally, Art. 41 (1) of the Statute is part of its Chapter III on procedure. Procedural orders as such are legal in character and incorporate obligations; the parties are not free to comply with them or not. The Court may draw consequences in case of non-compliance, leading to disadvantages for the non-complying party in the course of the respective proceedings. As concerns orders under Art. 48 of the Statute, they can be enforced under Art. 53 of the Statute. If other procedural orders mentioned in the same Chapter are legally binding, why should there be a difference for Provisional Measures? Why should orders on relatively minor issues, like the form and the time for the delivery of arguments, possess binding force, whereas orders on Provisional Measures that are so crucial for the preservation of a party's rights and for the fulfilment of the judicial function do not? Such a result would contradict all common sense. *A minori ad maius*, the more solemn and serious orders under Art. 41 of the Statute have to be regarded as binding as well.[381]

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[380] B. Ajibola, Compliance with Judgments of the International Court of Justice, in: M. Bulterman/M. Kuijer (eds.), *Compliance with Judgments of International Courts* (1996), p. 16.

4.144 To avoid misunderstandings, some clarifications should be made with regard to a statement of the Permanent Court of International Justice in the Case concerning *Free Zones of Upper Savoy and the District of Gex*, according to which interlocutory

> "orders ... have no 'binding' force ... or 'final' effect ... in deciding the dispute brought by the Parties before the Court".[382]

What the Court intended to say here was not that the Parties are free to respect or not respect Provisional Measures. Rather, it referred to the lack of binding force with regard to the final Judgment.[383] As Judge Weeramantry explained:

> "The Court was there merely giving expression to the principle that 'an order has no binding force *on the Court* in its ultimate decision on the merits'."[384]

4.145 Provisional Measures do not achieve the status of *res judicata*, as opposed to an interim Judgment, which would constitute a final and, in principle, irreversible decision in the case, at least partially. But even if Provisional Measures are not binding on the Court, they must be obligatory for the parties in order for their purpose to be achieved. This is the normal feature of Provisional Measures in municipal law as well: they are provisional, that is, without conclusive effect on the final decision, but at the same time binding on the parties.

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[381] Sep. Op. Weeramantry, *supra* note 353, at pp. 382 f.; E. Hambro, *supra* note 358, at p. 170; L. I. Sánchez Rodriguez, Sobre la obligariedad y efectividad de las medidas provisionales adoptadas por la Corte Internacional de Justicia: A proposito de la demanda de la República de Paraguay contra los Estados Unidos en el asunto Breard, Paper delivered at the 20th Congress of the Instituto Hispano-Luso-Americano de Derecho Internacional in Manila 1998, p. 11 (also published in *Anuario Hispano-Luso-Americano de Derecho Internacional*, vol. XIV (1999), p. 158), regards the systematic context as a strong argument for the binding force of Provisional Measures.

[382] *Free Zones of Upper Savoy and the District of Gex, Order of 19 August 1929, P.C.I.J., Series A, No. 22*, p. 13.

[383] Sep. Op. Weeramantry, *supra* note 353, at p. 385.

[384] Sep. Op. Weeramantry, *ibid.*, at p. 383, quoting Crockett, *supra* note 375, at p. 377 (emphasis added).

4.146 No argument against binding force can be deduced from the formula "measures suggested" used in Art. 41 (2) of the Statute. The word "suggested" appears in the English text only whereas the other authentic languages all use terms equivalent to "indicated". There is no indication that by this paragraph, which regulates notification of the measures, the first paragraph was to be modified. Thus, the formula cannot change the result of our interpretation of Art. 41 (1) of the Statute of the Court.

(3) Object and purpose

4.147 Any interpretation of a treaty provision must pay particular attention to its object and purpose. As Art. 41 (1) of the Statute spells out, its objective is to preserve the respective rights of either party pending a final decision on the merits. Moreover, the provision aims at securing the Court's ability to resolve, within the ambit of its jurisdiction, disputes under international law.

If the parties were not obliged to comply with Provisional Measures, these objectives could not be attained. If a party could render impossible the relief requested during proceedings, the rights affected would be left without effective protection. Thus, the Court would not be able to fulfil the task conferred on it by Art. 41 (1) of the Statute. Similarly, the Statute's purpose to enable States to have their disputes resolved judicially and to give them an entitlement to this effect under the condition of a jurisdictional link, could not be achieved.

As Judge Koroma stated in his Declaration in the *Case concerning Legality of Use of Force*:

> "Under Article 41 of the Statute of the Court, a request for provisional measures should have as its purpose the preservation of the respective rights of either party pending the Court's decision. ... Where the risk of irreparable harm is said to exist or further action might aggravate or extend a dispute, the granting of the relief

> becomes necessary. It is thus one of the most important functions of the Court."[385]

The Court itself has frequently emphasised that its authority under Art. 41 of the Statute presupposes that its Judgment

> "should not be anticipated by reason of any initiative regarding the measures which are in issue."[386]

As emphasised above, a State cannot withdraw its consent after proceedings have begun; the jurisdictional link, once established, remains valid for the respective case; it is not possible for the respondent to prevent the Court from rendering a Judgment once it has jurisdiction. This being so, States must be prohibited from interfering with the subject-matter of the case.

4.148 In sum, Provisional Measures can achieve their purpose only if they are construed as legally binding.[387] In the words of Sir Gerald Fitzmaurice:

> "The whole logic of jurisdiction to indicate interim measures entails that, when indicated, they are binding – for this jurisdiction is based on the absolute necessity, when the circumstances call for it, of being able to preserve, and to avoid prejudice to, the rights of the parties, as determined by the final judgment of the Court. To indicate special measures for that purpose, if the measures, when indicated, are not even binding (let alone enforceable), lacks all point".[388]

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[385] *Legality of Use of Force (Yugoslavia v. Belgium), (Yugoslavia v. Canada), (Yugoslavia v. France), (Yugoslavia v. Germany), (Yugoslavia v. Italy), (Yugoslavia v. Netherlands), (Yugoslavia v, Portugal), (Yugoslavia v. Spain), (Yugoslavia v. United Kingdom), (Yugoslavia v. United States of America)*, Orders of 2 June 1999, Declaration of Judge Koroma.

[386] *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, p. 34; *Aegean Sea Continental Shelf (Greece v. Turkey), Interim Protection, Order of 11 September 1976, I.C.J. Reports 1976*, p. 9.

[387] Addo, *supra* note 377, at p. 19.

[388] G. Fitzmaurice, *The Law and Procedure of the International Court of Justice*, vol. II (1986), p. 548 (footnotes omitted).

(4) The other authentic languages

4.149 Finally, a look at Art. 41 (1) in the other authentic languages confirms Germany's submission that Provisional Measures are binding.

Even if one admitted that the English formulation was somewhat imprecise, the same cannot be said about the texts in the other authentic languages. The Court's Statute is equally authentic in English, French, Spanish, Russian, and Chinese.[389] The French text reads:

> "La Cour a le pouvoir d'indiquer, si elle estime que les circonstances l'exigent, quelles mesures conservatoires du droit de chacun doivent être prises à titre provisoire";

the Spanish text:

> "La Corte tendrá facultad para indicar, si considera que las circunstancias así lo exigen, las medidas que deban tomarse para resguardar los derechos de cada una de las partes."

the Chinese text:

> 法院如認情形有必要時，有權指示當事國應行遵守以保全彼此權利之臨時辦法。

the Russian text:

> "Суд имеет право указать, если, по его мнению, это требуется обстоятельствами, любые временные меры, которые должны быть приняты для обеспечения прав каждой из сторон."

All versions clearly reveal the obligatory character of the measures concerned. Both the French "devoir" and the Spanish "deber" refer to binding obligations and are to be translated with "must".[390] Similarly, "indiquer" and "indicar" carry a connotation of an obligation which is even stronger than in the English text.[391]

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[389] Art. 92, 111 UN Charter; Art. 33 (1) Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS, p. 331.

[390] Council of the EC, *EC Glossary French-English* (8th ed. 1990): il doit – it shall (legal instruments); E. Le Docte, *Dictionnaire de termes juridiques en quatre langues* (1987), p. 228, devoir = deber = duty; C. Smith, *Collins Spanish-English, English-Spanish Dictionary* (3d ed. 1998), p. 144; G. Cabanellas de las Cuevas/ E. C. Hoague, *Diccionario jurídico- Law Dictionary* (1990), p. 179: deber = to owe, to be in debt, to

The word "zhishi" (指示) in the Chinese version of Article 41 appears both in paragraphs 1 and 2, and can be used equally as a verb and as a noun. This word clearly speaks in favour of the legally binding character of the Provisional Measures. For purposes of translation, the word is used not only to reproduce the English term "to indicate" but also the term "to instruct". Thus in the Chinese language, if a mere hortatory meaning were to be attributed to the powers of the Court described in Article 41, a completely different word would have to be used.

The Russian version of Article 41 (1) employs the verb "ukasat" (указать) which means *inter alia* "to direct, to order, to prescribe". The verb is also a direct translation of the English verb "to indicate". The noun "ukasanije" (указание) means "direction" or "instruction".

4.150 Thus, with regard to all authentic languages there are extremely strong indications that Provisional Measures are meant to possess binding force. Even if one assumed, *arguendo*, that the English and Russian texts were open to a "softer" meaning also and would therefore allow both an imperative and a permissive reading, the Chinese, French and Spanish versions unambiguously demand a reading in the sense of binding character of an Order. For such instances, Art. 33 (4) of the Vienna Convention on the Law of Treaties provides that in cases of a difference in meaning which the application of the other means of interpretation does not remove, the meaning which best

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have to; María Molinar, *Diccionario de uso del español* (2nd ed. 1998), vol. A-H, p. 864: tener obligación de hacer lo que el verbo expresa = being obliged to do what the verb expresses.

[391] Sep. Op. Weeramantry, *supra* note 353, at p. 380: "Indeed, the French word 'indiquer' probably goes even further in this direction [of creating a connotation of an obligation] than the English word 'indicate', for one of the meanings of 'indiquer' is 'to draw up (a procedure, etc.); to dictate, to prescribe, lay down a line of action, etc."; quoting *Harrap's Standard French and English Dictionary*, vol. 1, p. I:18. As for the Spanish text, see Cabenellas de las Cuevas/Hoague, *supra* note 390, at p. 308 (indicar = to

reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.[392] Hence, if one language uses a term which embraces both the term used by the other language and a broader notion, the narrower meaning will prevail. In principle, however, in case of Art. 41 (1) of the Statute recourse to Art. 33 (4) of the Vienna Convention on the Law of Treaties is not necessary because an interpretation according to Art. 31 of the same Convention already allows the reading of the English text to the effect that Provisional Measures are binding. But assuming, *arguendo*, that this was not really clear, any remaining doubts as to whether the wording might imply the binding character of Provisional Measures disappear in view of the other authentic texts. The correct reading is thus the imperative one.

(5) The travaux préparatoires provide evidence in support of the binding character

4.151 The preparatory work and the circumstances of the adoption of Art. 41 (1) of the Statute may be considered as supplementary means of interpretation, but only insofar as they

- confirm the meaning resulting from the application of Art. 31 Vienna Convention on the Law of the Treaties, that is, under the general rule of interpretation (which has been applied above);

- determine the meaning where an interpretation according to Art. 31 leaves it ambiguous or obscure, or leads to a manifestly absurd or unreasonable result (Art. 32 Vienna Convention on the Law of Treaties).

4.152 Consequently, recourse to supplementary means cannot overturn a clear result obtained under the general rule, unless this result is manifestly absurd or unreasonable. Therefore, recourse to Art. 32 Vienna Convention on the Law of Treaties is unnecessary as regards the interpretation of Art. 41 (1) of the

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indicate, to express, to instruct); Smith, *supra* note 390, at p. 277.

Statute because the interpretation pursuant to the general rule has already led to the unambiguous result that Provisional Measures are legally binding, which is the only interpretation compatible with the functions and the authority of the Court. If the supplementary means were nevertheless to be taken into account, they would also confirm the obligatory character of interim measures. The French text, as the original version of the provision, clearly establishes an obligation on States. The English text is merely a translation of the French text.[393] The French version "pouvoir d'indiquer" was originally translated by "power to suggest". However, later it was assumed that a stronger term was necessary and the word "suggest" was substituted by "indicate".[394]

4.153 Moreover, as already explained above, the drafters of the Statute of the Permanent Court of International Justice followed a diplomatic precedent, that is, they were inspired by the Bryan Treaties of 1914 and used language "with a certain diplomatic flavor" without thereby intending to deprive the Court of the means necessary to fulfil its tasks.

As Judge Weeramantry has observed:

> "The drafting history shows that the Court's power goes beyond mere suggestion or advice, but carries some connotation of obligation."[395]

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[392] Vienna Convention on the Law of Treaties, *supra* note 389.

[393] In the Assembly of the League of Nations it was agreed to take the French version as basis, see Procès-Verbaux of the Third Committee of First Assembly, Fifth Meeting, 29 Nov. 1920, reprinted in League of Nations, *Permanent Court of International Justice, Documents Concerning the Action Taken by the Council of the League of Nations*, vol. 3 (1920), at p. 134. See also Sztucki, *supra* note 369, at pp. 263 ff., and Sep. Op. Weeramantry, *supra* note 353, at p. 380.

[394] *Ibid.*

[395] *Ibid.*, at p. 380.

f) The practice of the Court supports the binding character of Provisional Measures

4.154 As Judge Weeramantry has pointed out in the *Genocide* Case "there is much that is suggestive of the Court's implicit acceptance of the binding nature of Provisional Measures."[396] While the earlier practice of the Court was still somewhat reluctant in this regard, its more recent practice provides clearer indications in favour of binding force.

4.155 As to the earlier practice, the *Nuclear Tests* Cases may serve as an example. There, the Court recited without comment Australia's arguments that "in the opinion of the Government of Australia the conduct of the French Government constitutes a clear and deliberate breach of the Order of the Court of 22 June 1973."[397] Even though the position referred to was obviously that of Australia, the Court's recital of that quotation without any comment can be considered as evidence of a tacit and indirect endorsement.[398]

In the *Nicaragua* Case, the Court pointed out:

> "When the Court finds that the situation requires that measures of this kind should be taken, it is incumbent on each party to take the Court's indications seriously into account".[399]

In the second Order on Provisional Measures issued in the *Genocide* Case, the Court first quoted this very statement but then added:

> "whereas this is particularly so in such a situation as now exists in Bosnia-Herzegovina where no reparation could efface the results of

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[396] *Ibid.*, at p. 384.

[397] *Nuclear Tests (Australia v. France), I.C.J. Reports 1974*, p. 259 (para.19).

[398] Sztucki, *supra* note 369, at pp. 272 f.; Sep. Op. Weeramantry, *supra* note 353, at pp. 384 f.

[399] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 144, para. 289.

> conduct which the Court may rule to have been contrary to international law."[400]

The matter became even clearer in the *Lockerbie* Cases, where the Court refrained from indicating Provisional Measures because

> "an indication of the measures requested by Libya would be likely to impair the rights which appear prima facie to be enjoyed by the United Kingdom by virtue of Security Council Resolution 748 (1992)".[401]

The Court's line of argument can only be explained by attributing binding force to Provisional Measures. How could Provisional Measures interfere with rights if they were deemed to lack legal effect?[402]

4.156 President Schwebel, in his Declaration to the Court's order in the *Breard* Case, pointed to

> "the serious difficulties which this Order *imposes* on the authorities of the United States and Virginia."[403]

This wording, too, is indicative of an obligatory character of Provisional Measures.

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[400] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993, p. 349.

[401] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, Order of 14 April 1992, I.C.J. Reports 1992*, p. 15 (para. 41) (p. 127 [para. 44] in the parallel Case instituted against the United States).

[402] M. Aznar-Gómez, A propos de l'affaire relative à la Convention de Vienne sur les relations consulaires (Paraguay c. Etats-Unis d'Amérique), 102 *Révue Générale de Droit international public* (1998), pp. 933 f.:

> "[T]oute la discussion doctrinale, par exemple, après l'ordonnance du 14 avril 1992 en l'affaire *Lockerbie* perdrait une partie de sa signification si l'on n'admettait pas la nature obligatoire des mesures conservatoires. ... Comment les mesures indiquées par la Cour pourraient-elles 'porter atteinte' aux droits conférés par ladite résolution si elles ne sont pas sensées avoir de force obligatoire?"

[403] *Vienna Convention on Consular Relations (Paraguay v. United States of America), Order of 9 April 1998, I.C.J. Reports 1998*, Declaration of President Schwebel, p. 259;

3. The parties to a dispute before the Court have the duty to preserve its subject-matter

4.157 Apart from having violated its duties under Art. 94 (1) of the United Nations Charter and Art. 41 (1) of the Statute, the United States has also violated the obligation to refrain from any action which might interfere with the subject-matter of a dispute while judicial proceedings are pending. This is a general obligation of litigant states under customary law which is merely concretised in the provisions of the Charter and the Statute just mentioned.[404] All States parties to an international dispute *sub judice* are under an absolute obligation to abstain from all acts that would nullify the result of the final judgment or aggravate or extend the dispute. In the words of H. Niemeyer of more than sixty years ago,

> "[f]rom the moment that, and as long as, a dispute is submitted to judicial decision and one is awaited, the parties to the dispute are under an obligation to refrain from any act or omission the specific factual characteristics of which would render the normative decision superfluous or impossible".[405]

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emphasis added.

[404] K. Oellers-Frahm, *Die einstweilige Anordnung in der internationalen Gerichtsbarkeit* (1975), pp. 110 f., 115; Hambro, *supra* note 358, at p. 167; Mani, *supra* note 375, at pp. 362 f. As explained by P. Goldsworthy, Interim Measures of Protection in the International Court of Justice, 68 *American Journal of International Law* (1974), p. 260: "The practice of states reveals acceptance of a general obligation to maintain the status quo pending a final decision in a dispute". See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations of 24 October 1970, General Assembly Resolution 2625 (XXV), reprinted in 9 *International Legal Materials* (1970), p. 1292; J. Elkind, *Interim Protection: A Functional Approach* (1981), p. 162 stresses the universal recognition of the binding nature of interlocutory injunctions and similar measures and concludes that this rule may even be considered to be a "general principle of law recognized by civilized nations" under Art. 38 (1) (c) of the Court's Statute.

[405] H. Niemeyer, *Einstweilige Verfügungen des Weltgerichtshofs, ihr Wesen und ihre Grenzen* (1932), pp. 15 f. (as quoted and translated in the Separate Opinion of Judge Weeramantry, *supra* note 353, at p. 378); R. St. J. MacDonald, Interim Measures in International Law, with Special Reference to the European System for the Protection of Human Rights, 52 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1992), p. 730, summarizes the general rule as follows: "[P]arties who submit to the jurisdiction of a court have the implied obligation not to act in such a way as to render the judgment of the court meaningless."

4.158 This rule exists independently of its incorporation in the Charter and the Statute. It further confirms our result that both Art. 94 (1) of the United Nations Charter and Art. 41 (1) of the ICJ Statute can only be interpreted to the effect that Provisional Measures are binding. The existence of this rule independently of treaty law was already emphasised by influential commentators on the Statute of the Permanent Court of International Justice.[406] The Permanent Court of International Justice has pointed out that Art. 41 reflects

> "the principle universally accepted by international tribunals... to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute".[407]

As E. Hambro observed:

> "The Court in exercising its authority under Art. 41 does only in effect give life and blood to a rule that already exists in principle".[408]

4. The international legal obligations violated by the United States' conduct with regard to the Court's Order of 3 March 1999

a) The general attitude of the United States vis-à-vis Orders of the Court

4.159 The general attitude of the United States vis-à-vis Orders of the Court can best be described as selective. On the one hand, the Respondent appears to admit in general that this Court's Orders as such are capable of imposing obligations on the parties. On the other hand, however, the United States' views on how such

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[406] Dumbauld, *supra* note 373, at pp. 173 ff.; Niemeyer, *supra* note 405, at pp. 15 f.

[407] *Electric Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J., Series A/B, No.79*, p.199.

[408] Hambro, *supra* note 358, at p. 167. In his Separate Opinion in the *Genocide* Case, Judge Weeramantry cites this statement with approval, *supra* note 353, at p. 377.

Orders are to be implemented have differed depending on the procedural situation in which it found itself in various cases.

4.160 The United States explicitly acknowledged the necessity to comply with Provisional Measures indicated by the International Court of Justice during the *Hostages* Case. Thus, in a situation where the United States itself was dependent on such measures for an adequate protection of its rights, it did rely on their binding force.

Since the Court's Order on Provisional Measures of 15 December 1979 in the *Hostages* Case[409] remained without response by the Iranian Government, the subsequent action of the United States in the Security Council was, *inter alia*, based on the argument that Iran had breached its obligation to comply with that Order.[410] In its draft proposal for a Security Council Resolution under Chapter VII, the United States mentioned the Court's Order and proposed the enactment of sanctions according to Article 39 and 41 of the Charter if the Resolution was to be adopted (which did not happen because of the exercise of the veto power by a permanent member).[411] Before the Council, Secretary of State Cyrus Vance referred to the Order of the World Court and pointed out:

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[409] *United States Diplomatic and Consular Staff in Tehran (United States v. Iran), Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979*, p. 7.

[410] See S. Shank/J. Quigley, Obligations to Foreigners Accused of Crime in the United States: A Failure of Enforcement, 9 *Criminal Law Forum* (1999), p. 117.

[411] The U.S. proposal read as follows:

> "*The Security Council* ...
>
> *Having taken into account* the Order of the International Court of Justice of 15 December 1979 calling on the Government of the Islamic Republic of Iran to ensure the immediate release, without any exception, of all persons of United States nationality who are being held as hostages in Iran and also calling on the Government of the United States of America and the Government of the Islamic Republic of Iran to ensure that no action will be taken by them which will aggravate the tension between the two countries, ...
> *Bearing in mind* that the continued detention of the hostages constitutes a continuing threat to international peace and security,

> "It is not only 50 American men and women who are held hostage in Iran; it is the international community. ... The time has come for the world community to act, firmly and collectively, to uphold international law and to preserve international peace."[412]

And further:

> "My Government therefore seeks a resolution which would condemn Iran's failure to comply with earlier actions of the Security Council and of the International Court calling for the immediate release of all the hostages. ... [The resolution] would decide that if the hostages have not been released when the Council meets again at the specified early date, the Council will at that time adopt specific sanctions under Article 41 of the Charter."[413]

As Shank and Quigley put it:

> "The use of the terms 'remedies' and 'compliance' and the seeking of Security Council action all suggested that the United States viewed the interim order as binding on Iran."[414]

4.161 In the *Nicaragua* Case, the United States submitted that the indication of Provisional Measures would be inappropriate, arguing that

> "[i]n the present situation in Central America, the indication of such measures could irreparably prejudice the interests of a number of states and seriously interfere with the negotiations being conducted pursuant to the Contadora process"

and that

> "the other States of Central America have stated their view that Nicaragua's request for the indication of provisional measures

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Acting in accordance with Articles 39 and 41 of the Charter of the United Nations,

1. Urgently calls once again on the Government of the Islamic Republic of Iran to release immediately all persons of United States nationality ...".

Security Council, Official Records, Thirty-fifth Sess., Suppl. (Jan. – March 1980), U.N. Doc. S/13735 (1980), p. 10, footnote omitted.

[412] Statement of the U.S. Secretary of State, Cyrus Vance, *Security Council, Official Records*, Thirty-fourth Sess., 2182nd mtg., U.N. Doc. S/PV.2182 (1979), p. 6.

[413] *Ibid.*

[414] Shank/Quigley, *supra* note 410, at p. 120.

> directly implicates their rights and interests, and that an indication of such measures would interfere with the Contadora negotiations."[415]

These statements would make no sense if they were not read in the sense of an implicit recognition of legal effects of Provisional Measures: only an order which can be the source of rights and obligations can be deemed to interfere with rights of other states.

4.162 The argument the United States advanced in the *Lockerbie* Case was similar: it objected to the indication of Provisional Measures, sustaining that

> "any indication of provisional measures would run a serious risk of conflicting with the work of the Security Council".[416]

Thus, once again, we find an implicit recognition of the legal significance of Provisional Measures indicated by the Court.

4.163 The flagrant disrespect for the Court's Order in the *Breard* Case[417] has met harsh criticism world-wide.[418] What is worth noting, however, is how careful the United States Federal Government was *not* to suggest that Provisional Measures were not binding.[419] Therefore, we do not think that even in that case the United States wanted to assert that Provisional Measures lack legal significance.

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[415] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984*, p. 183 (para. 33) and p. 184 (para.35).

[416] *Lockerbie*, *supra* note 401, at p. 126 (para. 40).

[417] For a summary of the facts, see J. Charney/W. Reisman, Agora: Breard- The Facts, 92 *American Journal of International Law* (1998), pp. 666 ff.

[418] Addo, *supra* note 377; M. Aznar-Gómez, *supra* note 402; R. Carnerero Castilla, Algunas cuestiones de derecho internacional suscitadas por el „caso Breard" XIV *Anuario Hispano-Luso-Americano de Derecho Internacional*, (1999), p. 239; E. Rieter, Interim Measures by the World Court to Suspend the Execution of an Individual: The Breard Case, 16 *Netherlands Quarterly of Human Rights* (1998), p. 475; L. Sánchez Rodríguez, *supra* note 381. See also the contributions of various authors to the Agora: Breard in 92 *American Journal of International Law* (1998), pp. 666 ff.

[419] Addo, *supra* note 377, at p. 22.

In *Breard*, in the course of the oral proceedings before this Court, the United States did not challenge the Court's power under Art. 41 of the Statute. Instead, it argued that under the given circumstances the adoption of Provisional Measures would be inappropriate. Thus, the agent for the United States emphasised that "the indication of provisional measures is a matter of serious consequence" and was of "potentially far-reaching consequences."[420]

What happened subsequently in the course of the "implementation" of the Order was a combination of insufficient and contravening action on the part of various actors. As Professor L. Henkin described it,

> "[i]f the Order of the Court was mandatory and created treaty obligations for the United States, it was law for all the parties in the Breard drama who, in fact or in effect, represented the United States. Secretary Albright heard the voice of the International Court and acted upon it. But the Solicitor General seemed to be under the impression that the Order of the Court was not addressed to him (or that he was not bound by it). The Supreme Court was also perhaps under the impression that the ICJ Order was not addressed to it, that it was not bound by it, or that it had no responsibility (and no means) to honor it. The Department of Justice did not take other measures to obtain compliance by the state of Virginia with the treaty obligation of the United States to stay the execution. Governor Gilmore seemed to be under the impression that the International Court of Justice was not addressing him; perhaps he did not think he was required to honor Secretary Albright's request."[421]

As in the present case, the Governor in charge made no effort to implement the Order of the Court. On the contrary, he intentionally refrained from doing so, arguing:

> "Should the International Court of Justice resolve this matter in Paraguay's favor, it would be difficult, having delayed the execution so that the International Court could consider the case, to then carry

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[420] *Application of the Vienna Convention on Consular Relations (Paraguay v. United States), Request for the Indication of Provisional Measures*, Oral Argument of 7 April 1998, Uncorrected Verbatim Record, CR 98/7, paras. 3.2 (Mr. Crook) and 4.13 (Mr. Matheson).

[421] L. Henkin, Provisional Measures, U.S. Treaty Obligations and the States, 92 *American Journal of International Law* (1998), p. 680 (footnotes omitted).

> out the jury's sentence despite the rulings [of] the International Court."[422]

Thus, the Governor not only refrained from

> "tak[ing] all measures ... to ensure that Breard [was] not executed",

as requested by the Court[423], but acted in such a way as to make the relief sought by Paraguay impossible. It is a matter of common sense that such conduct is unacceptable. Besides being illegal, it contradicts every sense of justice and fairness. The Governor's action is attributable to the United States, since under international law a federal State is responsible for actions of its political sub-divisions.[424]

Moreover, it was not only the Governor himself who failed to pay due regard to the Order of this Court. The Federal Government as well refrained from taking the necessary measures; it acted only half-heartedly, by simultaneously appealing to the Governor of Virginia to halt the execution and, on the other hand, in an *amicus curiae* brief advising the U.S. Supreme Court not to intervene.[425]

4.164 In this *amicus curiae* brief, both the Department of Justice and the State Department expressed a preference for the non-binding character of Provisional Measures referring to the scholarly discussion on this issue. In the *amicus curiae* brief as well as in the letter of Secretary of State Albright to the Governor of Virginia, Gilmore, the focus was on the special features of the specific Order at stake, concluding that "measures at its disposal" left a broad discretion to the United States on the action to be taken, to the effect that the attempt by the Federal Government to persuade the Governor of Virginia would be sufficient in this regard – a conclusion as untenable in the *Breard* Case as in the case at hand. The very fact that the Department of State did take certain – though entirely inadequate – steps provides evidence that the United States acknowledged the legal significance of this Court's Order. On the other hand, the Federal Government misinterpreted both the scope of the obligation and its addressees. Thus, in her letter to the Governor of Virginia, Secretary of State Albright wrote, *inter alia*:

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[422] Statement of Jim Gilmore, Governor of Virginia, 14 April 1998, ANNEX 59, p. 2.

[423] *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures*, Order of 9 April 1998, I.C.J. Reports 1998, p. 258 (para. 41).

[424] See on this question in detail *supra* Part Five, Ch. I.

[425] Brief for the United States as Amicus Curiae, 1997 U.S. Briefs 1390, ANNEX 34,

> "The International Court, however, was not prepared to decide the issues we raised in its urgent proceedings last week. *Using non-binding language*, the Court said that the United States should 'take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings.'"[426]

4.165 In the present Case, less than a year later, the Solicitor General of the United States took the unequivocal view that the Court's Orders on Provisional Measures are not binding, irrespective of the wording of a specific Order.[427]

b) The legal obligations arising from the Order of the Court of 3 March 1999

4.166 The Order on Provisional Measures issued on 3 March 1999 imposed an unconditional obligation on the United States not to execute Walter LaGrand pending the final decision of this Court. Even though the precise scope of the obligations stemming from an Order of the Court may vary from case to case, and may grant the addressees a more or less broad margin of appreciation, in our specific case, the Order was worded in clear and unequivocal terms:

> "The Court... indicates the following Provisional Measures: (a) The United States of America should *take all measures at its disposal to ensure that Walter LaGrand is not executed* pending the final

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at p. 51.

[426] Letter of Secretary of State Albright to the Governor of Virginia, 13 April 1998, ANNEX 37 (emphasis added). Obviously, this reference to "non-binding language" cannot convince, given the clear prescriptions expressed in the Order, see L. Henkin, *supra* note 421, at p. 680.

[427] See *infra* note 439 and accompanying text.

> decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order, ..."[428]

Thus, the operative part of the Order contains no ambiguity or discretion whatsoever: its objective could not be clearer, that is, the execution of Walter LaGrand was not to take place pending a final decision. Neither was the scope of the obligation, i.e. that all United States authorities in charge were to take the necessary steps within their respective competence to ensure that this objective was achieved. The discretion left to the United States concerned exclusively the selection of the instruments of municipal law necessary to reach the result. The formula "take all measures at its disposal" – far from weakening the obligation imposed by the Order – embodies a comprehensive duty directed at all State organs to make sure that Walter LaGrand was not executed.

4.167 In an earlier paragraph of the same Order, the Court had already emphasised:

> "Whereas the international responsibility of a State is engaged by the action of the competent organs and authorities acting in that State, whatever they may be;
>
> whereas the United States should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings;
>
> whereas, according to the information available to the Court, implementation of the measures indicated in the present Order falls within the jurisdiction of the Governor of Arizona;
>
> whereas the Government of the United States is consequently under the obligation to transmit the present Order to the said Governor;
>
> whereas the Governor of Arizona is under the obligation to act in conformity with the international undertakings of the United States;"[429]

Thus, what the Order did was not simply to ask the United States to take into consideration whether it might be feasible to stay Walter LaGrand's execution, or that it might be fairer towards Germany to refrain from measures affecting the subject-matter of the proceedings. Rather, without leaving any room for doubts or opposing interpretations, it ordered the United States to take *all measures* to ensure that Walter LaGrand was not executed pending a final decision. Moreover, the Court made it clear that this obligation was not only incumbent on the Federal Government, but on all organs exercising public authority relevant in our context. The Order thus cut off any kind of "federal State excuse" right from the beginning. It emphasised not only that unlawful acts of all organs of a State, regardless of their status within national law, can entail the international responsibility of that State, a point self-evident for every international lawyer, but over and above that, it determined clearly how and by whom the Order was to be implemented, that is, by the Governor of Arizona, and stressed that the latter was obliged to act in conformity with the international undertakings of the United States. Consequently, it was not only the Federal Government which was obliged to take all measures to halt the execution. The Order was directed at the United States as a whole, at all its organs and authorities, and in particular at the Governor of Arizona.

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[428] *LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999*, p. 16 (para. 29), emphasis added.

c) The reaction to the Order on the part of the United States

4.168 In its Order of 3 March 1999, the International Court of Justice indicated the following provisional measures:

> "(a) The United States of America should take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings, and should inform the Court of all the measures which it has taken in implementation of this Order;
>
> (b) The Government of the United States of America should transmit this Order to the Governor of the State of Arizona."[430]

In a letter to the U.S. Supreme Court concerning the Case brought by Germany on 3 March 1999,[431] the Solicitor General was, this time, unequivocal in his

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[429] *Ibid.*, p. 16 (para. 28).

[430] *Ibid.*, p. 16 (para. 29).

rejection of the binding character of Orders issued by the International Court of Justice. Before the Supreme Court, he argued that

> "an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief ... ."[432]

4.169 In a letter to the International Court of Justice dated 8 March 1999, the Legal Counselor of the Embassy of the United States at The Hague, Mr. Allen S. Weiner, informed the Court of the measures taken in implementation of this Order. According to this letter, the only step that the U.S. Government had undertaken was that

> "[o]n March 3, 1999, the Department of State transmitted to the Governor of Arizona a copy of the Court's Order of the same day."

What is immediately apparent is that this action only refers to the second of the measures indicated by the Court, e.g. the obligation to transmit the Order to the Governor of Arizona. At first sight it seems that the United States did comply with this part of the Order. However, what the State Department actually did was strictly limited to the purely technical process of transmitting the text of the Order to the Governor of Arizona. It undertook nothing at all to support the implementation of the Order – for instance, by adding a letter requesting the Governor to give effect to the Order of the Court or other similar steps. Rather, the State Department refrained from taking any position with regard to the substance of the matter. Hence, the speaker of the State Department, Mr. Foley, when asked at a press conference on 3 March 1999 whether or not the State Department had taken a position other than simply transmitting the documents, was undoubtedly correct in stating:

> "No, we have not. We simply transmitted the documents."[433]

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[431] See the Statement of Facts, *supra* Part II, note 33 and accompanying text; *Germany v. United States*, 119 S.Ct. 1016, ANNEX 33.

[432] ANNEX 28, p. 2.

[433] ANNEX 38.

4.170 Within the United States legal system, the opinion of the State Department on questions of international law is of great importance. Thus, in the view of the U.S. Supreme Court

> "[a]lthough not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."[434]

Seen in conjunction with the State Department's position in the *Breard* Case in 1998, where it qualified a virtually identical Order as "non-binding" and affirmed a right of the Commonwealth of Virginia to proceed with the execution notwithstanding an Order of the International Court of Justice,[435] the uncommented transmittal of the Order in the present Case could be regarded almost as an encouragement to the Governor of Arizona to go forward and execute Walter LaGrand. Thus, it is highly disputable whether the "neutral" attitude assumed by the State Department vis-à-vis the Order of the Court of 3 March 1999 deserves to be qualified as a measure of implementation at all, even with regard to the obligation laid down in lit. (b) of the Provisional Measures.

4.171 On the other hand, it is undisputed that the United States adopted no measures at all to implement lit. (a) of the Provisional Measures indicated by the Court. Thus, it engaged in no activities whatsoever to meet its obligation to take

> "all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision in these proceedings."

On the contrary, it advised the Supreme Court not to intervene in the case.

If one takes a closer look at the events in the immediate aftermath of the issuance of the Provisional Measures, one arrives at an even more negative result: Leaving aside the whole range of political and legal means at the disposal of the Government of the United States to halt the execution – not used in the present Case and described elsewhere in the present Memorial[436] –, what the letter of the United States to the International Court of 8 March 1999 avoided to mention was a number of active steps, attributable to the United States, which paved the way for the execution of Walter LaGrand. Thus, instead of implementing the Order, organs of the United States, quite on the contrary, took active steps in order to deprive the Order of its object. The assessment by Professor L. Henkin on the *Breard* Case,

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[434] *Sumitomo Shoji Arica, Inc. v. Avagliano*, 457 U.S. 176, 184, 185 (1982); *United States v. Stewart*, 489 U.S. 353, 369 (1989).

[435] See the letter of the Secretary of State of 13 April 1998, ANNEX 37.

> "[i]ndeed, contrary to the Order of the International Court, 'the United States' took some measures that helped assure that the execution would take place",[437]

is even more valid in the case of Walter LaGrand, since here the United States did not even consider it necessary to formally request the Governor that she exercise her power to stay the execution, as had been done a year before by the Secretary of State in the *Breard* Case.

4.172 Thus, the U.S. Government actively assisted in bringing about the execution of Walter LaGrand in blatant disregard of the Order of the Court in a threefold way:

(1) Immediately after the International Court of Justice had rendered its Order on Provisional Measures, Germany appealed to the U.S. Supreme Court in order to reach a stay of the execution of Walter LaGrand, in accordance with the International Court's Order to the same effect. In the course of these proceedings – and in full knowledge of the Order of the International Court – the Office of the Solicitor General, a section of the U.S. Department of Justice – in a letter to the Supreme Court argued once again[438] that:

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[436] See *infra*, Part Six, Ch. IV.

[437] Henkin, *supra* note 421, at p. 681.

[438] As it had already done in 1998 in the similar Brief in the *Breard* Case, 1997 U.S. Briefs 1390, ANNEX 34, at pp. 49 ff.

> "an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief."[439]

This statement of a high-ranking official of the Federal Government not only blatantly disregarded the Order of the Court in itself but also had a direct influence on the decision of the Supreme Court.

A further conclusion to be drawn from the mere existence of the letter of the Solicitor General of 3 March 1999 is that the allegation in the U.S. letter to the International Court of Justice of 8 March 1999 to the effect that

> "[i]n view of the extremely late hour of the receipt of the Court's Order, no further steps were feasible"

is unconvincing, to put it mildly. If the U.S. Department of Justice found the time to express in writing its views on the legal consequences arising from the Provisional Measures of the Court, why was it not feasible for the Department of State to do the same? If one considers that the Department of State was the first U.S. Government agency learning of the Order of the Court – and thus in a position to act under less time pressure than any other U.S. governmental body – it is quite obvious that the reason for the omission of any positive steps on the part of the State Department was not that the Department was not able to act but rather that it was simply not willing to do so.

4.173 (2) In the following, the U.S. Supreme Court – an agency of the United States – refused by a majority vote to order that the execution be stayed.[440] In doing so, it rejected the German arguments based essentially on the Order of the International Court of Justice on Provisional Measures. What deserves special attention is that, leaving aside the two dissenting Justices, two Justices of the Supreme Court expressly based their approval of the decision on the position taken by the Solicitor General in his letter of the same day. These Justices placed on record that

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[439] Letter of Solicitor General Seth P. Waxman of 3 March 1999, ANNEX 28.

[440] *Germany v. United States*, 119 S.Ct. 1016 (1999), ANNEX 32.

> "In exercising my discretion, I have taken into consideration the position of the Solicitor General on behalf of the United States."[441]

Thus, the decisive influence of the official position of the U.S. executive branch on the outcome of the Supreme Court proceedings becomes visible.

Further, in not making use of its discretionary power to stay the execution of Walter LaGrand, the U.S. Supreme Court, too, disregarded the Order of the International Court and thus contributed to the breach of a respective international legal obligation.

4.174 (3) Finally, the Governor of Arizona did not order a stay of the execution of Walter LaGrand although she was vested with the right to do so by the laws of the State of Arizona. Moreover, in the present case, the Arizona Executive Board of Clemency – for the first time in the history of this institution – had issued a recommendation for a temporary stay, not least in light of the international legal issues involved in the case. Thus, legally speaking, the Governor was not subjected to any kind of legal pressure to go forward with the execution – rather to the contrary. Therefore, it is obvious that the Governor did not take all measures at her disposal – to use the wording of the Court's Order – to meet her legal obligations vis-à-vis the Provisional Measures indicated by the Court. On the contrary, in full awareness of the Court's Order, the Governor decided to disregard the Provisional Measures indicated by the International Court of Justice.

4.175 In summary, the activities of the United States relating to the Court's Order of 3 March 1999 were manifestly contrary to what the Court had requested in its legally binding decision. Far from taking all measures at their disposal to ensure that Walter LaGrand was not executed, U.S. State organs took several steps that led to exactly the opposite result, *i.e.* the execution of Walter LaGrand. Thus, the United States acted in clear violation of the Order of the Court.

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[441] *Ibid.*

IV. Conclusion

4.176 The United States has breached its obligation to inform German nationals arrested and detained of the rights under Art. 36 (1) (b) of the Vienna Convention, in particular their right to notification of the German Consulate. By not fulfilling the obligation to inform the German Consulate according to Art. 36 (1) (b), the United States further violated the right of consular access provided for in Art. 36 (1) (a) and (c) of the Vienna Convention.

Furthermore, the United States has violated Article 36 (2) of the Vienna Convention by not providing effective remedies against the violation of the requirements of Art. 36 (1) (b) of the Vienna Convention and by ultimately executing the LaGrand brothers.

In addition, the United States has violated the individual right granted to the LaGrand brothers by Art. 36 (1) (b) of the Vienna Convention. According to the rules of international law on diplomatic protection, this conduct is in breach of the rights of Germany as the State of which the LaGrands were nationals.

Finally, by executing Walter LaGrand, the United States violated the binding Order of this Court of 3 March 1999.

Part Five

Other conditions of the illegality of United States conduct

I. Attribution to the United States of the breaches of international legal obligations

5.01 It is a fundamental and well-established principle of international law that every internationally wrongful act of a State entails the international responsibility of that State. Commenting on Article 1 of its draft on State responsibility which embodies this very principle, the International Law Commission (ILC) rightly pointed out that we are here in the presence of

> "one of the principles most strongly upheld by State practice and judicial decisions and most deeply rooted in the doctrine of international law."[442]

The first precondition for the rules of State responsibility to come into operation in a given case is thus the existence of certain "acts of the State".

5.02 In the present Case, the acts giving rise to the German claims, described and assessed at length in Part Four of this Memorial, stem from a variety of governmental bodies within the United States, including in particular the authorities of the State of Arizona which first failed to advise the LaGrand brothers about their rights under the Vienna Convention and later declined to give effect to the Court's Order of 3 March 1999. Furthermore, various United States courts – both at the state as well as at the federal level – refused to comply with the obligations laid down in the Vienna Convention and the Court's Order on provisional measures. Finally, actions and omissions on the part of the legislative and executive branches of the U.S. Federal Government, among them certain conduct of the Solicitor General, contributed to the internationally wrongful acts which are at stake in the present case. All this has been amply demonstrated above.[443]

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[442] *Yearbook of the International Law Commission* 1973, vol. II, p. 173, with numerous further references.

5.03 As this Court has recently reconfirmed in its Advisory Opinion of 29 April 1999 on the *Difference Relating To Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, it is a well-established rule of customary international law that the conduct of any organ of a State must be regarded as an act of that State.[444] In so holding, the Court was able to rely not only on its own established jurisprudence and that of its predecessor, but also on a great number of other international awards, the more or less unanimous position in legal doctrine and finally, codification drafts of both private and official nature. With regard to this latter source, the Court[445] makes an express reference to Article 6 of the draft on State responsibility adopted by the International Law Commission on first reading in 1996,[446] which provides:

> "The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or internal character, and whether it holds a superior or a subordinated position in the organization of the State."[447]

Article 7 (1) of the same draft further specifies this very categorical and comprehensive rule with regard to the responsibility of a federal State for the conduct of organs of its component units:

> "1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under

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[443] See Part Four of the present Memorial.

[444] *I.C.J. Reports 1999*, not yet published, para. 62.

[445] *Ibid.*

[446] See Report of the International Law Commission on the work of its forty-eighth session, *General Assembly, Official Records*, Fifty-first Session, Suppl. No. 10, UN Doc. A/51/10, p. 124.

[447] *Ibid.*, at p. 126.

> international law, provided that organ was acting in that capacity in the case in question."[448]

The changes made on the 1996 text of these articles in the course of the second reading of the draft articles which is currently underway[449] are merely designed to make them

> "more user-friendly, more streamlined as well as more precise, and have freed them from considerable dead weight."[450]

No substantive changes whatsoever are intended.

5.04 The commentaries of the International Law Commission with their extensive analysis of State practice, international jurisprudence and doctrine leave no doubt that the substance of the draft articles just referred to reflects well-established rules of customary international law.[451]

5.05 This is particularly true for the status of courts, which are to be regarded as organs of a State just like organs of the legislative or executive branch. With particular attention to legislative and judicial organs, the careful analysis undertaken by the International Law Commission in its commentary on [1996] draft article 6 arrives at the conclusion that in this regard there is no need to appeal to ideas of progressive development of international law because

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[448] *Ibid.*, at p. 127.

[449] Thus, the content of the "old" Articles 5, 6 and 7 para. 1 is now to be found in Article 5 of the draft articles provisionally adopted by the ILC's Drafting Committee in 1998, which reads as follows:

> "1. For the purposes of the present articles, the conduct of any State organ acting in that capacity shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
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> 2. For the purposes of paragraph 1, an organ includes any person or body which has that status in accordance with the internal law of the State."

(Text in: B. Simma, The Work of the International Law Commission at Its Fiftieth Session [1998], 67 *Nordic Journal of International Law* [1998], p. 479).

[450] B. Simma, *ibid.*, at p. 449.

[451] See *Yearbook of the International Law Commission* 1973, vol. II, pp. 193 ff., and *Yearbook of the International Law Commission* 1974, vol. II part 1, pp. 277 ff. See also the Commentary on the draft article 5, *Yearbook of the International Law Commission* 1973, vol. II, pp. 191 ff.

> "[t]oday the opinion that the respective positions of the different branches of government are important only in constitutional law and of no consequence whatsoever in international law, which regards the State as a single entity, is firmly rooted in international judicial decisions, the practice of States and the literature of international law."[452]

Concerning this point, reference is to be made to the established jurisprudence of this Court and its predecessor, the Permanent Court of International Justice, which stated in its Judgment in the *Case concerning Certain German Interests in Polish Upper Silesia*:

> "From the standpoint of International Law and of the Court which is its organ, municipal laws ... express the will and *constitute the activities of States*, in the same manner as do *legal decisions* or administrative measures."[453]

This jurisprudence has since been confirmed by both judicial bodies in a whole series of judgments and advisory opinions.[454]

5.06 Likewise, there exists practical unanimity with regard to the principle that a federal State is internationally responsible for the conduct of the organs of its component states. More specifically, a consistent series of judicial decisions –

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[452] *Yearbook of the International Law Commission* 1973, vol. II, p. 196.

[453] *P.C.I.J., Series A, No. 7, 1926*, p. 19; emphasis added.

[454] *S.S. "Lotus", 1927, P.C.I.J., Series A, No. 10*, p. 24; *Jurisdiction of the Courts of Danzig*, Advisory Opinion, 1928, P.C.I.J., Series B, No. 15, p. P. 24; *Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 28; *Ambatielos, Merits, Judgment, I.C.J. Reports 1953*, pp. 21 ff. See also most recently the Advisory Opinion concerning the *Difference relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, General List No. 100, unpublished, for the text see Internet-Website of the International Court of Justice, http://www.icj-cij.org, para. 63: "The Malaysian courts did not rule *in limine litis* on the immunity of the Special Rapporteur. ... Consequently, Malaysia did not act in accordance with its obligations under international law."

beginning with the *Monteijo* Award rendered on 26 July 1875 by a U.S.-Colombian arbitral tribunal – has affirmed that this principle also applies in situations in which its internal law (allegedly) does not provide the federal State with the means of compelling the organs of the component units to conform to the deferral State's international obligations. In the words of the Umpire in the *Monteijo* case, Robert Bunch,

> "it will probably be said that by the constitution of Colombia the federal power is prohibited from interfering in the domestic disturbances of the States, and that it can not in justice be made accountable for acts which it has not the power, under the fundamental charter of the republic, to prevent or to punish. To this the undersigned will remark that in such a case a treaty is superior to the constitution, which latter must give way. The legislation of the republic must be adapted to a treaty, not the treaty to the laws ... It may seem at first sight unfair to make the federal power .... responsible ... for events over which they have no control ... but the injustice disappears when this inconvenience is found to be inseparable from the federal system. If a nation deliberately adopts that form of administering its public affairs, it does so with the full knowledge of the consequences it entails. It calculates the advantages and the drawbacks, and can not complain if the latter now and then make themselves felt."[455]

The principle thus forcefully stated in the *Monteijo* Award has been reaffirmed in many decisions since[456] and the essence of the argumentation put forward by the Umpire in this early case still holds true after almost 125 years.

5.07 Summing up, there exists hardly any other rule of international law which is so undisputed as the rule that the position of an organ of the State in the organisation of that State does not enter into consideration for the purpose of attributing the organ's conduct to the State – that is to say, of regarding such conduct as an "act of the State" under international law.[457] Therefore, whatever

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[455] *"Monteijo" Case*, J. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (1898), vol. II, pp. 1440 f.

[456] See for further references *Yearbook of the International Law Commission* 1974, vol. II part 1, pp. 279 ff.

[457] See also *Yearbook of the International Law Commission* 1973, vol. II, pp. 193 f.

organ has acted or failed to act in the present case in breach of the international legal obligations of the United States, such acts and omissions are all attributable to the United States and thus give rise to the international responsibility of the United States.

II. Irrelevance of the domestic law of the United States

5.08 The legal rule governing the relationship between the international legal obligations of a State and its municipal law in the context of the law of State responsibility is clear and simple: Whenever a State is in breach of its international legal obligations, it can under no circumstances invoke its internal law in order to justify such non-compliance.

Despite the difference of positions taken in the theoretical controversy about the relationship between municipal law and international law in general, there exists virtually an identity of views on this particular aspect. Such unanimous opinion has been expressed by Professor I. Brownlie in exemplary terms:

> **"The law in this respect is well settled. A state cannot plead provisions of its own law or deficiencies in that law in answer to a claim against it for an alleged breach of its obligations under international law."[458]**

The fundamental character of this principle and the comprehensive scope of its field of application was already emphasised more than 40 years ago by Sir Gerald Fitzmaurice:

> **"The principle that a State cannot plead the provisions (or deficiencies) of .... its constitution as a ground for the non-observance of its international obligations ... [This] is indeed one of the great principles of international law, informing the whole system and applying to every branch of it."[459]**

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[458] **I. Brownlie, *Principles of Public International Law* (5th ed. 1998), p. 34 (footnote omitted).**

[459] **G. Fitzmaurice, The general principles of international law considered from the standpoint of the rule of law, 92 *Recueil des Cours* (1957-II), p. 85.**

This issue was commented upon in *Oppenheim's International Law* as follows:

> "[I]f a state's internal law is such as to prevent it from fulfilling its international obligations, that failure is a matter for which it will be held responsible in international law. It is firmly established that a state when charged with a breach of its international obligations cannot in international law validly plead as a defence that it was unable to fulfil them because its internal law was defective or contained rules in conflict with international law; this applies equally to a state's assertion of its inability to secure the necessary changes in its law by virtue of some legal or constitutional requirement which in the circumstances cannot be met or severe or political difficulties which would be caused. The obligation is the obligation of the state, and the failure of an organ of the state, such as a Parliament or a court, to give effect to the international obligations of the state cannot be invoked by it as a justification for failure to meet its international obligations."[460]

Finally, the *Restatement of the Foreign Relations Law of the United States* confirms that

> "[a] state cannot adduce its constitution or its laws as a defense for failure to carry out its international obligation".[461]

5.09 The legal rules thus described are deeply rooted in international practice. Starting with the *Alabama* arbitration,[462] international judicial bodies, among them the International Court of Justice and its predecessor, the Permanent Court of International Justice, have established a consistent jurisprudence on this point.[463] For example, in the *Free Zones* case the Permanent Court of International Justice observed:

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[460] R. Jennings/A. Watts (eds.), *Oppenheim's International Law*, vol. I (9th ed. 1992), pp. 84 f. (footnotes omitted).

[461] *Restatement of the Law (Third), The Foreign Relations Law of the United States* (1987), vol. 1, p. 64, § 115, Comment b.

[462] See J. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* (1898), vol. I, p. 656: "And whereas the government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed ...".

[463] See the extensive references in *Oppenheim's International Law*, *supra* note 460, pp. 34 f., note 15 ff.

> "[I]t is certain that France cannot rely on her own legislation to limit the scope of her international legal obligations ... ."[464]

The Permanent Court left no doubt that the same principle applies when constitutional provisions are at stake. Thus, in its 1932 Advisory Opinion in the case concerning *Polish Nationals in Danzig* the Court held:

> "It should ... be observed that ... a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."[465]

Up to the present day, this jurisprudence has undergone no modifications whatsoever; rather on the contrary, it has been consistently reaffirmed ever since.[466]

5.10 As an emanation of the elementary and universally agreed maxim of *pacta sunt servanda* – rightly described by the International Law Commission as

> "the fundamental principle of the law of treaties",[467]

our principle has also been included in the Vienna Convention on the Law of Treaties. Article 27 (1) of this Convention reads as follows:

> "A State party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform the treaty."

This provision does not embody an innovative concept but restates a rule deeply rooted in general principles of international law, universally recognised at the time of the drafting of the Convention.[468] Thus, the fact that the United

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[464] *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 167.

[465] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, P.C.I.J., Series A/B, No. 44*, p. 24.

[466] See from the jurisprudence of the International Court of Justice, *inter alia*, the Judgments in the *Fisheries* Case (I.C.J. Reports 1951, p. 132) and in the *Nottebohm* Case (*I.C.J. Reports 1955*, pp. 20f.).

[467] *Yearbook of the International Law Commission* 1966, vol. II, p. 211.

[468] The article was not included in the draft prepared by the International Law Commission

States has not yet ratified the Vienna Convention on the Law of Treaties cannot release the Respondent from the duty to observe the substance of this provision. In this respect the *Restatement of the Foreign Relations Law of the United States* rightly points out that

> "[w]hen international law is not given effect in the United States because of constitutional limitations or supervening domestic law, the international obligations of the United States remain and the United States may be in default."[469]

5.11 In view of such overwhelming evidence of the existence of a respective rule in customary international law, it is not surprising that the International Law Commission included the principle in Article 4 of its draft on State responsibility, which provides:

> "An act of a State may only be characterized as internationally wrongful by international law. Such characterization cannot be affected by the characterization of the same act as lawful by internal law."[470]

After having provided a comprehensive analysis of the entire range of practice, jurisprudence and doctrine, the Commentary of the Commission on this article could only conclude:

> "Judicial decisions, State practice and the works of writers on international law leave not the slightest doubt on that subject."[471]

Thus, the domestic law of the United States and its application in the present case by certain organs both at the federal and state level, in particular the

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because it was thought that the principle belonged to the field of State responsibility rather than to the law of treaties. See I. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed. 1984), p. 84, with further references.

[469] *Restatement of the Law (Third), The Foreign Relations Law of the United States* (1987), vol. 1, Introduction to Chapter Two, p. 40.

[470] Report of the International Law Commission on the work of its forty-eighth session, *supra* note 446, at p. 126. In the version provisionally adopted by the Drafting Committee in 1998, Art. 4 reads as follows: "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law." See Simma, *supra* note 449, at p. 479.

[471] Yearbook of the International Law Commission 1973, vol. II, at p. 185.

doctrine of procedural default, or certain restraints which the U.S. federal system allegedly imposes on the capacity of the United States to act in conformity with its international legal obligations, do not constitute circumstances precluding the wrongfulness under international law of the conduct of the United States described in detail in Part Four of the present Memorial.

III. No necessity of fault on the part of the organs of the United States

5.12 A further question to be considered at this point is whether the responsibility of the United States for the breaches of international law set out earlier is conditional upon the presence of a subjective element, *i.e.*, fault on the part of the State organs involved. This subjective element would range from malicious intent (*dolus*) to culpable negligence. While certain authors still defend this theory, particularly for the case of violations of international law taking the form of omissions, it is definitely on the retreat. The dominant view today adopts a theory of objective responsibility, under which any action or omission which produces a result that is a breach of a legal obligation gives rise to responsibility irrespective of any considerations about the mental or psychological side of things.[472]

5.13 As is well known, the International Law Commission in its project on State responsibility bases itself on such an objective approach. The only elements of an internationally wrongful act which the Commission recognises in its draft article 3[473] are (1) that a certain conduct of a State consisting of an action or omission is attributable to that State under international law, and (2) that such conduct constitutes a(n objective) breach of an international obligation of the

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[472] *Cf.* Brownlie, *supra* note 458, pp. 439 ff.

[473] See Report of the International Law Commission on the work of its forty-eighth session, *supra* note 446, at p. 126. On second reading, the substance of the Article remained unchanged, see Simma, *supra* note 449, at p. 479.

State. In choosing this approach, the ILC does not exclude that in certain specific instances an additional subjective element might be required in order to "complete" the preconditions of international responsibility. However, for the Commission, the question of when responsibility presupposes fault, such as inadvertence or negligence, on the part of organs of the State is to be answered through the interpretation of, the primary rules breached. According to what nowadays is probably the leading view, performance of the primary rules in question will be subjected to a standard of due diligence, which "objectivises", as it were, the subjective element of fault.[474]

5.14 In the context of the present case, the issue of objective versus subjective responsibility is obviously relevant but does not pose any problems for the case of Germany. If the Court followed the approach chosen by the International Law Commission, it would determine the presence of the two objective elements of an internationally wrongful acts – breach and attribution – in the conduct of the United States, and that would be the end of the matter. If, additionally, the Court decided to inquire whether the breach of Art. 36 (1) of the Consular Convention by way of omission was due to negligence, or a lack of due diligence, on the part of the organs of the State of Arizona, the result would undoubtedly be affirmative.

Particularly in the light of the admission during the proceedings before the Executive Board of Clemency of the State of Arizona on 23 February 1999 by State Attorney Peasley that the authorities of the State of Arizona had been aware since 1982, that is, from the outset, that Karl and Walter LaGrand were German nationals, there can be no question that such conduct did not meet any imaginable standard of due diligence in the application of Art. 36 (1) of the Vienna Convention. It appears that the Arizona authorities simply did not care about their respective international obligations. Thus, we are in presence of gross negligence, to put it mildly.

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[474] For a good (critical) exposition of the ILC view see A. Gattini, La notion de faute à la lumière du project de convention de la Commission du Droit International sur la responsabilité internationale, 3 *European Journal of International Law* (1992), pp. 253 ff.; *id.*, Smoking/No Smoking: Some Remarks on the Current Place of Fault in the ILC Draft Articles on State Responsibility, 10 *European Journal of International Law* (1999), pp. 397 ff. For the most recent Commission debate on this point see the Report of the International Law Commission on the work of its fifty-first session, 3 May to 23 July 1999. *General Assembly Official Records, Fifty-fourth Session*, Supplement No. 10 (A/54/10), paras. 416 ff.

As already emphasised earlier, it was the emergence of these shocking facts that made Germany decide to change its course from pursuing the avenue of moral and political appeals for mercy to bringing this case before the world's highest Jurisdiction.

5.15 As to the later conduct of U.S. executive authorities and courts, both at the Federal and State level, leading to the breach of Art. 36 (2) of the Vienna Convention and the non-abidance with the International Court's Order on Provisional Measures, there can be no doubt that all U.S. State organs engaged in the case were fully aware that what they did or did not do involved issues of international law, indeed international legal obligations upon the United States. If they happened to commit errors regarding the law, this provides no justification or excuse.[475] If they committed the breaches in cognisance of the illegality of their acts, the situation is even more serious.

IV. Exhaustion of local remedies

5.16 The application of the rule according to which the exercise of diplomatic protection by a State presupposes that the national concerned has exhausted all legal remedies available to him or her in the State which is alleged to be the author of the injury, has no place in instances of direct injury to a State.[476] Therefore, this rule does not apply to the breaches of international law by the

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[475] *Cf.* J. Crawford, Second report on State responsibility, International Law Commission, Fifty-first session (1999), UN Doc. A/CN.4/498/Add. 2, p. 20, para. 260.

[476] See with extensive references Brownlie, *supra* note 458, pp. 496 ff.

United States committed directly vis-à-vis Germany, as described in Part Two Chapters I and III of the present Memorial.

5.17 The local remedies rule, a "well-known principle", as J. Crawford calls it in his second report on State responsibility,[477] is generally accepted[478] and has also been embodied in the draft of the International Law Commission.[479]

The individual rights of Karl and Walter LaGrand violated by the United States and vindicated before this Court by Germany by way of diplomatic protection, have been exposed at length in Chapter II of Part Four of the present Memorial. It is obvious that both Karl and Walter LaGrand exhausted all remedies at their disposal within the judicial system of the United States, even including proceedings before the Executive Board of Clemency of the State of Arizona just shortly before their execution.[480] Hence, there is no need in the present case to further examine the exact scope of the local remedies rule and the various conditions applying to it.

In sum, in the present case, the local remedies rule does not constitute a bar to the invocation of the responsibility of United States in the present case.

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[477] *Cf.* J. Crawford, Second report on State responsibility, International Law Commission, Fifty-first session (1999), UN Doc. A/CN.4/498, p. 56, para. 137.

[478] The International Court of Justice for example has characterized it as "an important rule of international law": *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 15 (para. 50).

[479] See for the text of article 22 of the draft as adopted on first reading, Report of the International Law Commission on the work of its forty-eighth session, *supra* note 446., at p. 132, and for a new proposal by Special Rapporteur J. Crawford (article 26bis), Second report, *supra* note 477, at p. 67.

[480] See for the exact account of the legal remedies resorted to in both cases *supra* Part Two of the Present Memorial (Statement of Facts).

V. Conclusion

5.18 **All (further) prerequisites of the international responsibility of the United States exist in the present case:**

The acts which led to the breach of the international obligations at stake are all attributable to the United States.

Precepts and doctrines of the domestic law of the United States as applied by its competent authorities in the case of the LaGrands may not be invoked as circumstances precluding the wrongfulness of the breaches committed.

Further, whether one follows an objective or a subjective theory of State responsibility (with regard to the element of intent or negligence), the responsibility of the United States in the present case is unquestionable.

Finally, to the extent necessary within the present context, the local remedies available to the LaGrand brothers were all exhausted.

Part Six

Consequences of the internationally wrongful acts of the United States

6.01 **Germany's Memorial now turns to the question of the remedies which it requests from the United States. Since the LaGrand brothers have both been executed, their fate cannot be corrected. The Respondent being a close friend and ally of Germany, the only objective which Germany pursues in referring this case to the International Court of Justice is to secure that in the future German nationals will not be arrested and detained without being informed of their right to receive consular assistance. For this reason, Germany will not pursue further any remedies which would go beyond this objective. For the same reason, what Germany does request of the Court is that it pronounce the failure of the United States to abide by its respective commitments under international law, and the duty of the United States to provide Germany with guarantees that it will not repeat such illegal conduct in the future.**

6.02 **In the following, Germany will set out its claims in detail. First, it will address preliminary issues such as the applicability of the general rules of State responsibility. In addition, it will specify the two remedies it is seeking, namely:**

(1) the pronouncement of the wrongfulness of the United States conduct in the present case;

(2) a guarantee that the United States will not repeat its illegal acts and ensure the respect of its obligations towards Germany in the future.

Second, Germany will show that it has been injured by the conduct of the United States and that therefore it has the right to invoke the international responsibility of the Respondent. Third, Germany will demonstrate that the prerequisites for the remedies it seeks are present. Finally, Germany will argue that no circumstances exist which would prevent or alleviate the duty of the

United States to provide satisfaction and guarantee the non-repetition of its illegal conduct.

I. Preliminary issues

6.03 Under this heading, Germany will argue for the applicability of the rules of general international law on State responsibility, as embodied in the International Law Commission's draft articles, to the present case. Further, it will explain the modifications of its original claims against the United States.

1. Applicability of the general rules of State responsibility

6.04 First, Germany will argue that the general régime of State responsibility applies to the present Case. It is led to do so because in the *Breard* Case,[481] Counsel for the Respondent raised doubts regarding whether violations of the law on diplomatic and consular relations entail the same legal consequences as violations of other rules of international law, namely the duty to repair the damage. Counsel argued that the Vienna Convention of 1963 somehow excluded the application of the general remedies of State responsibility.

6.05 Such a view is based on a profound misunderstanding of the jurisprudence of the International Court of Justice. The question of remedies for violations of Art. 36 of the Vienna Convention is governed by the customary international law on State responsibility because, first, these rules are applicable even if this is not expressly foreseen in the treaty whose violation gave rise to the case, and, second, the Vienna Convention does not constitute a self-contained régime, that is, it does not embody a special régime of consequences and enforcement mechanisms in case of its violation, to the exclusion of the general rules.

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[481] See *Application of the Vienna Convention on Consular Relations (Paraguay v. United States), Request for the Indication of Provisional Measures*, Oral Argument of 7 April 1998, Uncorrected Verbatim Record, CR 98/7, para. 3.20 (Mr. Crook).

6.06 With regard to the first point, Germany submits that the general rules of State responsibility are applicable to all kinds of internationally wrongful acts unless expressly stipulated otherwise. This derives from the very nature of the rules on State responsibility as "secondary rules" which are to be applied whenever "primary" obligations have not been observed. Therefore, the circumstance that Art. 36 of the Vienna Convention does not explicitly mention a remedy in case of its violation is not a valid argument against the applicability of the general régime of State responsibility. To state otherwise would mean that it would be necessary for each and every treaty or convention to reiterate the rules on State responsibility. In the *Hostages* Case, the Unites States was quite correct in arguing that

> "[t]he Court's jurisprudence establishes that 'the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.' (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 21; see also *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174, at p. 184.) Indeed, in the *Corfu Channel* case *(Merits, Judgment, I.C.J. Reports 1949*, p. 4 at pp. 23-24), this Court stated that it follows from the establishment of the responsibility of a State for the breach of an international obligation 'that compensation is due.'"[482]

The ILC Draft on State responsibility (on whose authoritative character see *infra*[483]) maintains the same fundamental principle in its very first article:

> "Every internationally wrongful act of a State entails the international responsibility of that State."[484]

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[482] *United States Diplomatic and Consular Staff in Tehran*, Memorial of the United States, *I.C.J. Pleadings 1980*, p. 188.

[483] Ch. I 2.

[484] Report of the International Law Commission on the work of its forty-eighth session (1996), General Assembly, Official Records, 51st Session, Suppl. No. 10, UN Doc.

Art. 17 of the same Draft further specifies:

> "An act of a State which constitutes a breach of an international obligation is an internationally wrongful act regardless of the origin, whether customary, conventional or other, of that obligation."[485]

6.07 This position is also in line with the dominant view in U.S. doctrine. Thus, according to the *Restatement of the Foreign Relations Law of the United States*,

> "[a] state whose national has suffered injury ... has, as against the state responsible for the injury, the remedies generally available between states for violation of customary law ... *as well as* any special remedies provided by any international agreement applicable between the two states."[486]

6.08 The applicability of the general rules of State responsibility to the Vienna Convention on Consular Relations was also implied in the process of drafting the 1963 Vienna Convention by the International Law Commission. The Commission apparently considered this to be so clearly established that it did not have to be mentioned in the text of the Convention. According to the Summary Records of the Commission, Grigory Tunkin remarked:

> "If the law of the receiving State concerning the matter under discussion conflicted with international law, that State's international responsibility might well be engaged, he thought,

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A/51/10, p. 125. In the version provisionally adopted by the Drafting Committee of the International Law Commission in the course of the second reading in 1998, *reprinted in*: B. Simma, The Work of the International Law Commission at Its Fiftieth Session (1998), 67 *Nordic Journal of International Law* (1998), p. 479, the provision has remained unchanged.

[485] Report of the International Law Commission on the work of its forty-eighth session, *supra* note 484, at p. 130. In the course of the second reading of the 1996 draft, the ILC Drafting Committee embodied the content of Art. 17 of 1996 in a newly-formulated draft article 16 which now reads:

> "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."

UN Doc A/CN.4/L.574 and Corr. 1.

[486] *Restatement of the Law (Third), The Foreign Relations Law of the United States* (1987), vol. 2, p. 216 (§ 713 (1)), emphasis added. *See also* Comment h, *ibid.*, at p. 220.

> however, that that problem exceeded the scope of the Commission's draft."[487]

Therefore, the rules of State responsibility apply to the present case just as they would to any other violation of any other rule of international law.

6.09 Second, one might possibly argue that the general régime of State responsibility is not applicable to treaties or conventions which are truly and fully self-contained – provided that such treaties or conventions exist at all (the European Union Treaty possibly being a case in point). However that may be, the Vienna Convention on Consular Relations, and particularly its Art. 36, does certainly not constitute such a self-contained régime.

6.10 Germany's argument is fully in line with the Judgment of the Court in the *Hostages* Case. In that Case, the Court described the remedies available under diplomatic law to deal with abuses of the diplomatic function, namely the expulsion of diplomats by declaring them *persona non grata*[488] or the breaking-off of diplomatic relations altogether[489]. The Court went on to say:

> "The rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse."[490]

In the following, the Court stated that Iran had not had recourse to such remedies provided by the Convention itself but had instead resorted to illegal coercive action against the United States Embassy.

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[487] *Yearbook of the International Law Commission* 1960, vol. I, p. 51 (para. 27).

[488] See Art. 9 of the Vienna Convention on Diplomatic Relations; Art. 23 (1) and (4) of the Vienna Convention on Consular Relations.

[489] *United States Diplomatic and Consular Staff in Tehran, I.C.J. Reports 1980*, p. 3, at p. 39 (para. 85).

[490] *Ibid.*, at p. 40 (para. 86).

6.11 The first observation to be made about this *dictum* is that it refers to the abuse of diplomatic and consular rights and immunities, and not to the legitimate use of rights accorded by Art. 36 (1) of the Vienna Convention on Consular Relations to foreign nationals. Regarding illicit activities by members of diplomatic or consular missions, the Court explained,

> "diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions."[491]

However, what is at issue in the present Case are not "illicit activities by members of diplomatic or consular missions" but rather the safeguarding of the rights accorded by Art. 36 of the Vienna Convention to individual foreigners and the sending State. In the event of violations of these rights, the Convention does not provide any specific remedies of its own but remains coupled with, and relies on, the rules of general international law on State responsibility.

6.12 Even with regard to the rights accorded to diplomats, the Court qualifies its earlier statement as follows:

> "Naturally, the observance of this principle does not mean – and this the Applicant Government expressly acknowledges – that a diplomatic agent caught in the act of committing an assault or other offence may not, on occasion, be briefly arrested by the police of the receiving State in order to prevent the commission of the particular crime."[492]

Thus, the Court recognised that the "self-contained" nature of the 1961 and 1963 Vienna Conventions is limited even as far as remedies against violations by diplomats or consuls are concerned. For the reasons stated here, this must be even more so concerning rights provided by the Convention unrelated to the privileges and obligations of foreign diplomats and consuls, such as Art. 36 of the 1963 Convention.

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[491] *Ibid.*, at p. 38 (para. 83).

[492] *Ibid.*, at p. 40 (para. 86).

6.13 What the Court intended in the *Hostages* Case was the strengthening of international law, not its weakening by facilitating the disregard of treaty provisions through the absence of sanctions. Nowhere in the Judgment does the Court exclude a demand for reparation of violations of diplomatic law. Exactly the opposite: The Court decided that the Republic of Iran was

> "under an obligation to make reparation to the Government of the United States America for the injury caused to the latter".[493]

In the reasoning of the Court, the direct link between violations of consular and diplomatic law and international responsibility becomes even clearer:

> "[T]he Court finds that Iran, by committing successive and continuing breaches of the obligations laid upon it by the Vienna Conventions of 1961 and 1963 on Diplomatic and Consular Relations ... has incurred responsibility towards the United States. As to the consequences of this finding, it clearly entails an obligation on the part of the Iranian State to make reparation for the injury thereby caused to the United States."[494]

Germany in no way wishes to compare the Iranian behaviour in the hostage crisis with that of the United States towards the LaGrand brothers. However, the legal rationale of the passage of the Judgment just quoted is eminently applicable to our present case. The *Hostages* Case dealt with a flagrant breach of fundamental rules of diplomatic and consular law disguised as countermeasures, a disguise which the Court could not, and did not, accept. The present Case concerns a legitimate demand for correct and comprehensive fulfilment by the United States of its obligations under Art. 36 of the Vienna Convention on Consular Relations. It cannot have been the intention of the framers of the Convention to deprive this treaty of the protection accorded by the general rules of State responsibility. Thus, the *Hostages* Case, and the remedies granted to the United States by the respective Judgment of this Court, confirm rather than contradict Germany's demand for reparation for the violation of the Vienna Convention.

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[493] *Ibid.*, at p. 45 (para. 5 of the dispositif).

[494] *Ibid.*, at p. 42, paras. 90 f.

6.14 In the context of both the Breard litigation and the present Case, instead of applying these universally recognised principles, the United States seems to maintain that if a treaty does not expressly provide for it, no reparation is due in case of its breach.[495] Such a view turns the concept of "self-contained régimes" – denoting treaty instruments comprising their own, custom-made set of rules on responsibility – on its head, allowing the violation of international law free of cost. It would deprive most international obligations of any remedy and would leave the largest part of international law helpless in cases of breach. As President Schwebel has recently stated in his Declaration appended to the unanimous Order of the Court demanding a stay of execution of a national of Paraguay:

> "It is of obvious importance to the maintenance and development of a rule of law among States that the obligations imposed by treaties be complied with and that, where they are not, reparation be required."[496]

2. The ILC draft articles as expression of the applicable law

6.15 As to the applicable law, Germany considers the International Law Commission's draft articles on State responsibility as the most authoritative statement of customary international law on the matter.[497] This is in line with the recent jurisprudence of the Court. In its Judgment in the *Case concerning the Gabčíkovo-Nagymaros Project*, the Court applied the draft article on state of necessity as an expression of customary law[498] and later also referred to the draft provisions on countermeasures.[499] In its Advisory Opinion on the *Difference Relating to Immunity from Legal Processes of a Special Rapporteur of the Commission on Human Rights* of 29 April 1999, the Court applied draft article 6 entitled "Irrelevance of the position of the organ in the organization of the State"[500] as reflecting customary law.[501]

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[495] See the statement to this effect in the public hearing in the *Breard* Case, *supra* note 481.

[496] *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, p. 259.

[497] *Cf.* Report of the International Law Commission on the work of its fiftieth session, *General Assembly Official Records*, Fifty-third Session, Suppl. No. 10, UN Doc. A/53/10, paras. 202-214.

[498] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 39 ff. (paras. 49 ff.)

As President Schwebel recently explained in an address to the International Law Commission:

> "There were indeed instances in which the Commission had produced draft conventions later adopted by a diplomatic conference – or even draft conventions not yet so adopted – on which the Court had thereafter repeatedly relied in its Judgments. The most notable example was the draft convention on State responsibility. ... On more than one occasion the Court had recognized those draft articles as an authoritative statement of the law, sometimes even citing the commentaries thereto."[502]

6.16 Specifically regarding remedies, the International Tribunal for the Law of the Sea, in its Judgment in *The M/V "Saiga" (No. 2)* Case, referred to the draft articles and stated that

> "[r]eparation may be in the form of 'restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition either singly or in combination' (article 42, paragraph 1, of the Draft Articles of the International Law Commission on State Responsibility)."[503]

Although the draft articles on State responsibility may not reflect existing law in each and every detail, they constitute the most complete body of rules of the matter, elaborated with the broadest participation of the international community to date. In its comments of October 1997, the United States has been rather critical of the 1996 draft as a whole.[504] With regard to the provisions on reparation, however, the United States took the view that they were not too strict but, on the contrary, not strict enough.[505] However this may be with regard to detail, in the opinion of Germany the ILC draft articles on reparation do appear to furnish a basis for legal argumentation that should be acceptable to both parties in the present Case. As a matter of course, in relying on these provisions, Germany will provide supplementary evidence of customary international law on the issues involved.[506]

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[499] *Ibid.*, at p. 55 (para. 83).

[500] For its relevance in the present context, see *supra*, Part Five, Ch. I.

[501] General List No. 100, unpublished, for the text see Internet-Website of the International Court of Justice, http://www.icj-cij.org, para. 62.

[502] International Law Commission, Fifty-first session, Provisional Summary Record of the 2585th meeting, 10 June 1999, UN Doc. A/CN.4/SR.2585 of 17 June 1999.

[503] *M/V "Saiga" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, International Tribunal of the Law of the Sea, Judgment of 1 July 1999, unpublished, available under

3. The international responsibility of the United States and Germany's original claims

6.17 The internationally wrongful acts of the United States of America entail its international responsibility towards Germany. As the Permanent Court of International Justice has explained:

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http://www.un.org/Depts/los/Judg_E.htm (last visited 17 August 1999), para. 171.

[504] See United States Comments on the Draft articles on State responsibility (October 22, 1997), 37 *International Legal Materials* (1998), p. 468: "In particular, the sections on countermeasures, crimes, dispute settlement, and state injury contain provisions that are not supported by customary international law."

[505] *Ibid.*: "*Reparation*: While many of the points in the section on reparation reflect customary international law, other provisions contain qualification that undermine the well-established principle of 'full reparation.'" (emphasis in the original). In detail see *ibid.*, at pp. 478 ff.

[506] Germany will also refer to the second reading of the draft articles which is currently under way in the Commission. On the progress made so far by the ILC in this regard, see Report of the International Law Commission on the work of its fifty-first session, 3 May to 23 July 1999, *General Assembly Official Records*, Fifty-fourth Session, Suppl. No. 10, UN Doc. A/54/10, paras. 49 ff.

> "This act being attributable to the State and described as contrary to the treaty right of another State, international responsibility would be established immediately as between the two States."[507]

The same view was taken in the ILC's first draft article already cited.[508]

6.18 As a consequence of the breaches by the United States of its obligations under the Vienna Convention on Consular Relations and from a binding Order of the Court, it is incumbent on the United States to provide full reparation. That reparation constitutes the consequence of any internationally wrongful act was affirmed by the Permanent Court of International Justice in its pronouncement in the *Factory at Chorzów* Case:

> "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself."[509]

In a later stage of the same case, the Permanent Court used the following classic formula in order to clarify that the appropriate juridical remedy for a breach of international law is the wiping out of all of its consequences:

> "The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it – such are the principles which should serve to determine the

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[507] *Phosphates in Morocco, Preliminary Objections, Judgment of 14 June 1938, Series A/B 74*, p. 28.

[508] See *supra* note 484 and accompanying text.

[509] *Factory at Chorzów (Claim for Indemnity), Jurisdiction, Judgment of 26 July 1927, Series A No. 9*, p. 21.

> amount of compensation due for an act contrary to international law."[510]

This phrase is still regarded as an expression of customary international law on the matter, as evidenced, in the first place, by the jurisprudence of the present Court.[511]

6.19 According to these principles, Germany would be entitled to *restitutio in integrum*, that is, to the re-establishment of the situation that existed before the detention of, proceedings against, and conviction and sentencing of Walter LaGrand, just as Germany requested in Paragraph 15 of its Application of 2 March 1999. In the following brief remarks, Germany will explain why it originally asked for such restitution even though it will not further pursue its respective claim.

6.20 The remedy of revocation of a national judgment in breach of international law is not at all alien to State responsibility. First, domestic court decisions constitute acts of the State just as acts emanating from the executive or legislative branches of government. As explained above,[512] under the law of State responsibility, a State is responsible for all acts which are attributable to its organs. Second, judicial acts of States are subjected to the same régime of State responsibility as all other acts of States. In its Commentary to the draft articles on State responsibility the ILC states that

> "[h]ypotheses of juridical restitution include the revocation, annulment or amendment of a constitutional or legislative provision enacted in violation of a rule of international law, *the rescinding of an administrative or judicial measure unlawfully adopted in respect*

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[510] *Factory at Chorzów (Claim for Indemnity), Merits, Judgment of 13 September 1928, Series A No. 17*, p. 47.

[511] See, recently, *Gabčíkovo-Nagymaros (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at 77 (para. 149). See also *M/V "Saiga" (No. 2)*, International Tribunal for the Law of the Sea, *supra* note 503, para. 170.

[512] *Supra*, Part V, Ch. I.

> *of the person or the property of a foreigner* or the nullification of a treaty."[513]

6.21 This is in line with the general position of the draft articles to treat all acts of States alike, whatever their nature and irrespective of the branch of government from which they emanate. Third, a claim for annulment of a judgment of a domestic court would also be supported by international practice. For instance, in the *Martini* Case, an arbitral tribunal decided that the Venezuelan Government was under an obligation to annul the judgment of a domestic court in violation of treaty obligations owed to Italy.[514] Further examples are to be seen in Articles 302 (3) and 305 of the Peace Treaty of Versailles of 28 June 1919, which provided for *restitutio in integrum* in the case of judgments of German courts retrospectively considered illegal.[515] In various other instances, States have concluded treaties establishing international tribunals in which they explicitly excluded reparation in the form of annulment of judicial decisions if such annulment was to cause complications within the national legal order. In the words of the International Law Commission:

> "The fact that States deem it necessary to agree expressly in order to prevent restitution measures from gravely affecting fundamental principles of municipal law seems to indicate that they believe that at the level of general international law a correct discharge of the author State's obligation must prevail over legal obstacles."[516]

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[513] Commentary to Art. 43 of the Draft articles on State responsibility, para. (6), *Yearbook of the International Law Commission* 1993, vol. II part 2, p. 64 (footnotes omitted, emphasis added).

[514] *Affaire Martini (Italie c. Venezuela)*, Decision of 3 May 1930, 2 UNRIAA, p. 1002:

> "[E]n raison de l'attitude ainsi prise par la Cour Fédérale et de Cassation vis-à-vis de la Maison Martini & Cie dans ledit procès, le Gouvernement Vénézuélien est tenu, de reconnaître, *à titre de réparation*, l'annulation des obligations de paiement imposées à la Maison Martini & Cie"

(emphasis added).

[515] Parry, *Consolidated Treaty Series*, vol. 225, at pp. 337 f.

[516] See Commentary to draft article 43, *supra* note 513, at p. 61 (para 12).

6.22 But even if one considered international practice accepting *restitutio in integrum* in case of decisions of domestic courts as being somewhat inconclusive, the existence of a rule to the opposite, *i.e.*, of a rule unequivocally excluding this remedy in case of national judicial decisions, could not be maintained either. If this is so, however, there is no escaping the application of the general rule which demands the wiping out of all the consequences of an internationally wrongful act. The teachings of publicists confirm this view. For instance, Professor Brownlie states that

> "[t]o achieve the object of reparation, tribunals may give 'legal restitution' in the form of a declaration that an offending treaty, or the relevant act of the executive, legislative *or judicial organs of the respondent State is a nullity in international law.*"[517]

And the *Restatement of the Foreign Relations Law of the United States* asserts that

> "[t]he obligation of a state to terminate a violation of international law may include discontinuance, revocation or cancellation of the act (whether legislative, administrative or judicial) that caused the violation."[518]

Even authors reluctant to state that international law demands a declaration of nullity of domestic judgments in violation of international law maintain that the author State must endeavour to remove the material consequences arising out of the wrongful act by all means at its disposal and must prevent further damage, for instance by granting clemency.[519]

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[517] I. Brownlie, *System of the Law of Nations: State Responsibility (Part I)* (1983), p. 210 (emphasis added).

[518] *Restatement of the Law (Third), The Foreign Relations Law of the United States* (1987), vol. 2, p. 341, § 901, comment c). See also M. Aznar-Gómez, A propos de l'affaire rélative à la Convention de Vienne sur les relations consulaires (paraguay c. États-Unis d'Amérique, 98 *Revue générale de Droit international public* (1998), pp. 941 ff.; B. Graefrath, Responsibility and Damages Caused: Relationship between Responsibility and Damages, 185 *Recueil des Cours* (1984 II), p. 78: Restitution „can be directed towards enactment, repeal or modification of ... court decisions". Similarly, K. Zemanek, in: H. Neuhold, W. Hummer, and C. Schreuer eds., *Österreichisches Handbuch des Völkerrechts* (3d ed. 1998), vol. 1, p. 458 (§ 2487); A. Verdross/B. Simma, *Universelles Völkerrecht* (3d ed. 1984), p. 875 (§ 1295). For further references, see Commentary to Art. 43, *supra* note 513, at p. 60 (para. 12, n. 162 s.).

6.23 Whatever the state of the law may be in this regard, by the non-observance of the binding Order of the Court of 3 March 1999 the United States has made the return to the *status quo ante* impossible. The execution of a death sentence being irreversible, Walter LaGrand cannot stand for a new trial or a new sentencing hearing uninfected by the lack of consular advice. Therefore, Germany's submission aiming at the restoration of the *status quo ante* in the case of Walter La Grand is moot. On the other hand, it is the duty of the United States, and of the United States alone, to bear the consequences of such impossibility of *restitutio*. If and to the extent that Germany cannot provide pieces of evidence on the impact of the violation of Art. 36 of the Vienna Convention on the trial of the LaGrands, which could have been submitted if the brothers were still alive and able to testify on this matter, it is the United States which is required to bear the burden of proof.[520]

6.24 Turning from *restitutio in integrum* to reparation in the form of compensation,

> "[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it"[521].

Nevertheless, Germany does not wish to pursue its right to financial compensation, because its intention in lodging the present proceedings is to ensure that German nationals will be provided with adequate consular assistance in the future, and not to receive material reparation. Nothing stands in the way of such a decision on the part of the injured State. To refer to a

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[519] K. Zemanek, *supra* note 518, § 2488; H. Urbanek, Die Unrechtsfolgen bei einem völkerrechtsverletzenden nationalen Urteil; seine Behandlung durch internationale Gerichte, 11 *Österreichische Zeitschrift für öffentliches Recht* (1961), pp. 81f.

[520] For further details, see *supra* Part Four, Ch. I 3 c).

[521] *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment, I.C.J. Reports 1997*, p. 7, at p. 81 (para. 152).

recent precedent, in the *Case concerning the Rainbow Warrior Affair* between New Zealand and France the Arbitral Tribunal held as follows:

> **"The Tribunal ... considers that an order for the payment of monetary compensation can be made in respect of the breach of international obligations ... .**
>
> **New Zealand has not however requested the award of monetary compensation ... . The Tribunal can understand that position in terms of an assessment made by a State of its dignity and its sovereign rights."[522]**

6.25 All Germany requests is that the Respondent in the future respects the direct treaty rights of Germany as well as the rights of its nationals to consular advice.[523] Thus, Germany now limits its claims – and correspondingly its submissions – to requests for the pronouncement of the illegality and for assurances of non-repetition of such conduct in the future, and does not wish to pursue further its claims to financial compensation and an apology.

6.26 More specifically, Germany now requests the Court to pronounce (1) that the United States violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals; and (2) that the United States shall provide Germany a guarantee that it will not repeat its illegal acts.

In the following, Germany will specify these claims in necessary detail and will demonstrate that they are borne out both by the facts of the case and the applicable international law.

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[522] Decision of 30 April 1990, 20 *Reports of International Arbitral Awards*, p. 272 (paras. 118 f.).

[523] *Cf.* C. Gray, *Judicial Remedies in International Law* (1987), p. 105: "One of the main advantages of the declaratory judgment is that its use avoids the decree for reparation which could injure the dignity of the respondent state."

II. Injury and its independence from domestic "prejudice"

6.27 **Germany is entitled to invoke the responsibility of the United States because it is an injured State.**

6.28 Contrary to the contention of the United States during the oral proceedings on Provisional Measures in the *Breard* Case[524], international law does not require a showing of damage before the offending State's international responsibility is engaged. Since any breach of international law entails either material or non-material damage to another State, damage does not constitute an independent element of an internationally wrongful act. As the International Court of Justice explained in the *South West Africa* Cases:

> "[I]t may be said that a legal right or interest need not necessarily relate to anything material or 'tangible', and can be infringed even though no prejudice of a material kind has been suffered. ... The Court simply holds that such rights or interests, in order to exist, must be clearly vested in those who claim them, by some text or instrument, or rule of law; ... ."[525]

The same principle is expressed in ILC draft article 3, which enumerates only the following two requirements of an internationally wrongful act:

> "There is an internationally wrongful act of a State when:
> (a) conduct consisting of an action or omission is attributable to the State under international law; and
> (b) that conduct constitutes a breach of an international obligation of the State."[526]

As the Commentary to this article explains:

> "[I]f we maintain at all costs that 'damage' is an element in any internationally wrongful act, we are forced to the conclusion that any

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[524] *Application of the Vienna Convention on Consular Relations (Paraguay v. United States), Request for the Indication of Provisional Measures*, Oral Argument of 7 April 1998, Uncorrected Verbatim Record, CR 98/7, paras. 3.30 f. (Mr. Crook).

[525] *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 32 (para. 44).

[526] Draft articles on State responsibility, *supra* note 485, at p. 126. In the version adopted by the ILC's Drafting Committee in the course of the current second reading, the substance of the provision remained unchanged, see Simma, *supra* note 506, at p. 479.

> breach of an international obligation towards another State involves some kind of 'injury' to that other State. But this is tantamount to saying that the 'damage' which is inherent in any internationally wrongful act is the damage which is at the same time inherent in any breach of an international obligation."[527]

In the Case of the *Affaires des Biens britanniques au Maroc espagnol*, the Arbitral Tribunal coined the following classic formula:

> "La responsabilité est le corollaire nécessaire du droit. Tous droits d'ordre international ont pour conséquence une responsabilité internationale. La responsabilité entraîne comme conséquence l'obligation d'accorder une réparation au cas où l'obligation n'aurait pas été remplie."[528]

An analysis of international jurisprudence[529] and doctrine[530] confirms this view. Thus, as opposed to the situation in domestic law, the question of damage and/or "prejudice", strictly speaking, only concerns the prerequisites of certain remedies and not international responsibility as such.

6.29 Nevertheless, Germany has demonstrated, and will do so once more, that even if, *arguendo*, one did not follow the overwhelming precedents in the sense that it is unnecessary to show "prejudice" in order to invoke State responsibility, such "prejudice" has undoubtedly been caused to the LaGrand brothers by the failure of the U.S. authorities to advise them about their rights under the Vienna Convention on Consular Relations.

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[527] Commentary to the Draft articles on State responsibility, *Yearbook of the International Law Commission* (1973), vol. II, p. 183 (para. 12). Similarly, C. Rousseau, *Droit international public*, vol. V (198[illegible]), p. 14; *Restatement of the Law (Third), The Foreign Relations Law of the United States* (1987), § 901 and Comment a; A. Verdross/B. Simma, *Universelles Völkerrecht* (3d ed. 1984), p. 849 (para. 1264).

[528] *Affaires des biens britanniques au Maroc espagnol (Espagne c. Royaume-Uni)*, 1 May 1925, 2 *Reports of International Arbitral Awards*, p. 641.

[529] See, *e.g.*, *Factory at Chorzów, Jurisdiction, P.C.I.J. 1927, Series A, No. 9*, p. 21; *Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 23.

[530] See, *e.g.*, *Restatement of the Law (Third), The Foreign Relations Law of the United States* (1987), vol. 2, p. 340, § 901: "Under international law, every state that violates an obligation to another state is required to terminate the violation and, ordinarily, to make reparation. . . ."; Ch. Rousseau, *Droit International Public*, vol. V (1983), p. 210:

1. Injury to Germany

6.30 In the words of the Commentary of the ILC to its draft article 40,

> "it is necessary to determine which State or States are legally considered 'injured' State or States, because only that State is, or those States are, entitled to invoke the new legal relationship ... entailed by the internationally wrongful act."[531]

In its parts relevant for the present Case, draft article 40 reads as follows:

> "1. For the purposes of the present articles, 'injured State' means any State a right of which is infringed by the act of another State, if that act constitutes, in accordance with Part One, an internationally wrongful act of that State.
>
> 2. In particular, 'injured State' means:
> (a) ...
> (b) ...
> (c) if the right infringed by the act of a State arises from a binding decision of an international organ other than an international court or tribunal, the State or States which, in accordance with the constituent instrument of the international organization concerned, are entitled to the benefit of that right;
> (d) ...
> (e) if the right infringed by the act of a State arises from a multilateral treaty ..., any other State party to the multilateral treaty ... , if it is established that:
> (i) the right has been created or is established in its favour;
> (ii) ...
> (f) ... ."[532]

Accordingly, the main requirement for the presence of "injury" is that a right of the affected State has to be infringed. In the present Case, the injury to Germany has to be analysed separately with regard to each of the three layers of obligations breached by the United States (as set out in Part Four of the present Memorial).

"La réparation est une conséquence necessaire de l'acte illicite."

[531] *Yearbook of the International Law Commission* 1985, vol. II part 2, at p. 25 (para. 3).

[532] Draft articles on State responsibility, *supra* note 485, at p. 140.

a) Direct injury by violations of the treaty obligations of the United States towards Germany under Article 36 of the Vienna Convention

6.31 Through its non-observance of Art. 36 of the Vienna Convention in the case of the brothers LaGrand, the United States has violated a right created in favour of Germany, and thereby infringed a right of Germany in terms of draft art. 40 (1) and 2 (e) (i).

The violation of the Vienna Convention by the United States deprived Germany of its right to protect and assist its nationals in the gravest of circumstances: where in domestic criminal proceedings in the receiving State the very life of its nationals is being threatened. The breach at issue here infringed upon the rights granted under Article 36 (1) to Germany, as the sending State of which the LaGrands were nationals. As a direct result of the violation, Germany was unable to render any consular assistance during the ten-year period comprising the most crucial stages of the proceedings against its nationals. In short, the United States deprived Germany of the right to exercise an important governmental function at the only time when that function could have fulfilled its purpose: providing meaningful protection and assistance to German nationals on trial for their lives.

6.32 The rights at issue here are undeniably substantial. The Respondent itself has acknowledged that

> "Article 36 of the Vienna Convention contains obligations of the highest order and should not be dealt with lightly."[533]

Indeed, the United States told this Court in the *Hostages* Case that the right of consular

> "communication is so essential to the exercise of consular functions that its preclusion would render meaningless the entire establishment of consular relations."[534]

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[533] Cf. Arthur W. Rovine (ed.), *Digest of United States Practice in International Law* (1973), p. 161.

6.33 The ten-year delay between the arrest of the LaGrands and Germany's first opportunity to provide them with consular assistance aggravated both violation and injury, because the timing of the consular notification and assistance is an express and integral aspect of the rights granted by Article 36 (1) of the 1963 Vienna Convention. The words "without delay" are repeated in each of the three sentences that constitute subpara. (1) (b) of Art. 36. This focus on the rapidity of notification and communication reflects the recognition that, in many cases, unless consular assistance can be provided at the outset of criminal proceedings, it will turn out not to be effective at all.[535] In the pertinent words of the U.S. *Foreign Affairs Manual*:

> "In order for the consular officer to perform the protective function in an efficient and timely manner, it is essential that the consul obtain prompt notification whenever a U.S. citizen is arrested. *Prompt notification is necessary* to assure early access to the arrestee. *Early access in turn is essential*, among other things, to receive any allegations of abuse [and] to provide a list of lawyers and a legal system fact sheet to prisoners. ...
> Without such prompt notification of arrest, it is impossible to achieve the essential timely access to a detained U.S. citizen. ...
>
> *[P]rompt personal access* . . . provides an opportunity for the consular officer to explain the legal and judicial procedures of the host government and the detainee's rights under that government *at a time when such information is most useful*."[536]

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[534] *United States Diplomatic and Consular Staff in Tehran*, Memorial of the United States, *I.C.J. Pleadings 1980*, p. 174 (citations omitted).

[535] In the United States, timely notification is particularly vital because of the death penalty and the doctrine of procedural default, discussed in Part Four, Ch. I 3. This doctrine prevented U.S. courts from hearing essential evidence in both the *Breard* and *LaGrand* Cases once Paraguay and Germany, respectively, had discovered the situation of their nationals. The home country's consulates being prevented from immediately involving themselves in the judicial proceedings in the United States, prejudice to Germany's rights to render consular protection and assistance turned out to be undeniable and indelible. For details see *supra*, Part Four, Ch. I.

[536] U.S. Department of State, *Foreign Affairs Manual* (1984), ANNEX 60, 7 FAM 411 (emphasis added).

6.34 **The important role of the consular officer has been well described by Leonard F. Walentynowicz, former Administrator of the Bureau of Security and Consular Affairs in the U.S. Department of State:**

> **"[T]he consular officer after learning of an arrest seeks access to the accused to establish his identity and citizenship, to ensure he is aware of his rights, to advise him of the availability of legal counsel, to give him a list of local attorneys, to help him get in touch with his family and friends, to alert him to the legal and penal procedures of the host country and to observe if he had been or is in danger of being mistreated."[537]**

Similarly, the practices and procedures followed by the German Foreign Ministry call for its consular officers to render immediate assistance to German nationals detained abroad, particularly to those nationals facing a possible death sentence.[538] The United States' violation of Article 36 precluded Germany from rendering such assistance to the LaGrand brothers. Thus, Germany was injured in its rights by the breach on the part of the United States of the latter's obligations towards Germany under the Vienna Convention over an extended period of time.

b) Indirect injury to Germany by violation of the rights of its nationals

6.35 **By violating the rights of German nationals under Art. 36 (1) (b) of the Vienna Convention as set out in Part Four, Chapter II, of the present Memorial, the United States has also caused indirect injury to Germany. Under established principles of international law, the injury suffered by nationals is attributed to their home State.[539] As the Permanent Court of International Justice explained in the *Mavrommatis* Case:**

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[537] **Testimony of Mr. Walentinowicz before the House Committee on International Relations on 29 April 1975, in: E. McDowell (ed.), *Digest of United States Practice in International Law 1975*, p. 252.**

[538] **See *supra* Part Four, Ch. I 3 c) (2), note 217 and accompanying text.**

[539] **See *Mavrommatis Palestine Concessions, Jurisdiction, Judgment, 1924, P.C.I.J., Series A, No. 2*, p. 12. See also *Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J.*,**

> "It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law.
>
> The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant."[540]

Therefore, the United States has also caused indirect injury to Germany.

c) Direct injury by non-observance of an Order of the Court

6.36 By the non-observance of a binding Order of the Court, the United States has infringed a further right of Germany. The Commentary of the ILC draft articles on State responsibility explains:

> "The operative part of a judgment or other binding dispute-settlement decision of an international court or tribunal may impose an obligation on a State. ... [I]f any party to the dispute fails to perform the obligations incumbent upon it under the judgment, the other party to the dispute is the 'injured State'."[541]

The same is valid for the indication of interim measures of a binding character.[542] Since the Order on Interim Measures violated by the United States was binding,[543] Germany was injured by its non-observance.

Series A/B, No. 76, p. 16; *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 184.

[540] *Ibid.*

[541] Commentary to draft article 40, *supra* note 531, at p. 26 (paras 11 f.).

[542] *Ibid.* (para. 14).

[543] See *supra* Part Four, Ch. III.

2. The question of "prejudice" in domestic law

6.37 **As set out above, the injury suffered by Germany is independent of any additional "prejudice" that might be required by domestic law as a precondition for raising a violation of individual rights before domestic courts at a certain stage of proceedings.[544]**

6.38 **Nevertheless, the United States has argued both in the *Breard* Case and in the present Case**

> **"that few, if any, states would have agreed to Article 36 if they had understood that a failure to comply with consular notification would require undoing the results of their criminal justice systems."[545]**

As Germany has argued earlier, this opinion is based on a misunderstanding of the requirements of the law of State responsibility.[546] It amounts to saying that what States participating in the Vienna Convention have in mind is not the loyal performance of their obligations under the Convention but rather the consequences of a breach of these obligations. The opposite is much more plausible: States consenting to the Convention do so with the intention of fulfilling their treaty obligations, and assume as a matter of course that the general rules of State responsibility will apply in the case of breach.

6.39 **Nevertheless, in the domestic jurisprudence of the United States, the necessity of "prejudice" caused by violation of the Vienna Convention plays an important role[547]. Following this doctrine, there might at some stage in the case**

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[544] For "prejudice" in United States law, see *supra* Part Four, Ch. I. 3.

[545] *Application of the Vienna Convention on Consular Relations (Paraguay v. United States), Request for the Indication of Provisional Measures*, Oral Argument of 7 April 1998, Uncorrected Verbatim Record, CR 98/7, para. 2.14 (Ms. Brown), from where the citation above in the text is taken. For the present Case, see also the letter of the Solicitor General to the U.S. Supreme Court in the Case of Walter LaGrand, ANNEX 28, as well as the brief of the Solicitor General to the U.S. Supreme Court in the *Breard* Case, 1997 U.S. Briefs 1390, ANNEX 34, at pp. 12 f.

[546] See *supra*, Ch. II 1.

[547] See *supra*, Part Four, Ch. I 3 b and the cases cited there.

of the LaGrands well have been a violation of Art. 36 by the Arizona authorities but, the argument would continue, this violation had no effect. Germany contests this view as contrary to the generally accepted – international! – law of State responsibility, which demands nowhere that "prejudice" be shown before an injured State may invoke responsibility for a breach of international law. However, as proven above,[548] even under the assumption that the United States argument were relevant at the level of international law, Germany and the LaGrand brothers did suffer "prejudice" by the violation of Art. 36 of the Vienna Convention.

a) "Prejudice" is no requirement under the Vienna Convention or the law of State responsibility

6.40 In international law, "prejudice", that, is an effect of the lack of consular advice on a criminal conviction, does not need to be made plausible, let alone proved, before reparation can be demanded. The U.S. view to the contrary does not find any support whatsoever in the text of the Vienna Convention or in the applicable law of State responsibility. Rather, all that a State invoking the international responsibility of another State has to show is that it has suffered injury by violations of its rights under international law, as Germany has already done.[549]

6.41 Thus, responsibility for the violation of the Vienna Convention does not depend on the existence of "prejudice". As Shank and Quigley put it:

> "Besides infeasibility, the United States' argument about prejudice is inconsistent with the concept of consular protection. The Vienna Convention presumes the need for consular assistance for every foreign detainee. Otherwise, the right of consular access would not be guaranteed in the first place."[550]

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[548] *Ibid.*

[549] See *supra*, Part VI, Ch. I 3.

[550] S. Shank/J. Quigley, Obligations to Foreign Nationals Accused of Crime in the United

And the U.S. Solicitor General himself argued before the Supreme Court that

> "there is no workable way to determine whether consular notification would have made a difference at a defendant's trial, given the inviolability of consular archives and the privileges and immunities of consular officers."[551]

6.42 Aliens facing a foreign criminal justice system are necessarily disadvantaged through differences of culture and custom, and distance from their country. The normal procedural safeguards are not adequate to overcome this disadvantage and to protect the due process rights of a foreign defendant. Art. 36 of the Vienna Convention on Consular Relations guarantees consular notification and assistance precisely because the States Parties to it recognised this inherent prejudice, and likewise recognised the critical role of consular assistance in alleviating it.[552] Hence, the Vienna Convention requires advice to foreign nationals on the right to contact their consulate in order to enable them to have access to the resources and protection of their home country.

6.43 The States Parties to the Vienna Convention further recognised that if consular assistance is to effectively compensate for the inherent prejudice to detained foreign nationals, it must be available from the beginning and throughout the entire criminal legal process. Hence, Art. 36 requires notification to be given to the detained national, and if he or she so requests, to the sending State, "without delay". If promptly notified, consuls can arrange for adequate legal representation, explain the differences between the home State's legal procedures and those of the foreign country, and begin to help collecting evidence essential to the national's case.[553] Without prompt notification and

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States: A Failure of Enforcement, 9 *Criminal Law Forum* (1999), p. 110.

[551] Brief to the Supreme Court in *Breard v. Greene*, 1997 U.S. Briefs 1390, ANNEX 34, at p. 23. Similarly Ms. Brown, Counsel for the United States, *supra* note 545, para. 2.18.

[552] See S. Shank/J.Quigley, Foreigners on Texas' Death Row and the Right of Access to a Consul, 26 *St. Mary's Law Journal* (1995), p. 720.

[553] See generally M. Kadish, Article 36 of the Vienna Convention on Consular Relations: A Search for the Right to Consul, 18 *Michigan Journal of International Law* (1997), p. 565; Shank/Quigley, *supra* note 552, at p. 719.

access, effective consular assistance will be provided only rarely, if at all, and thus the prejudice to the national may become irreparable.

6.44 To put it in simple terms: Because the Vienna Convention assumes prejudice will occur due to the delay or lack of consular assistance, it logically does not require a showing of prejudice in order to make available a remedy for its violation. Such

> "[a]fter-the-fact assessments of whether the presumed prejudice actually resulted were not within the intent of [the States Parties]."[554]

Indeed, the United States itself acknowledged the impossibility of such an approach before this Court during the oral proceedings on Provisional Measures in the *Breard* Case, stating that it would be:

> "problematic to have a rule that a failure of consular notification required a return to the *status quo ante* only if notification would have led to a different outcome. It would be unworkable for a court to attempt to determine reliably what a consular officer would have done and whether it would have made a difference. ... Surely governments did not intend that such questions become a matter of inquiry in the courts."[555]

Thus, Germany does not need to show any "prejudice" additional to the injury already demonstrated.

b) The existence of "prejudice" in the trial of the LaGrand brothers

6.45 In any case, the argument of the necessity of "prejudice" would not operate in favour of the United States in the present context, because the violation of the right to be informed of the rights under Art. 36 of the Vienna Convention did have a decisive effect on the trial and conviction of the LaGrand brothers. As set out in Part Four, Chapter I. 3. c), the failure of the United States to advise the LaGrand brothers of their right to contact their consulate has caused them considerable damage or "prejudice", namely the death penalty, and has ultimately cost them their lives.

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[554] Kadish, *supra* note 553, at p. 565, Fn. 244, quoting Reply Brief Amicus Curiae of the United Mexican States, No. 96-14, *Murphy v. Netherland*, 116 F.3d 97 (4th Cir. 1997).

[555] *Application of the Vienna Convention on Consular Relations (Paraguay v. United States), Request for the Indication of Provisional Measures*, Oral Argument of 7 April

Thus, even if one accepted the doubtful proposition that the violation of the right to consular advice must have had an effect on the conviction of the LaGrand brothers in order to "injure" Germany, that condition would also be fulfilled because the lack of advice regarding their right to consular assistance prevented the LaGrand brothers from raising their troubled childhood and youth before United States courts and therefore contributed decisively to their being subjected to the death penalty.

3. Conclusion

6.46 By violating Art. 36 of the Vienna Convention and not observing the Order of the Court of 3 March 1999, the United States has injured Germany, both in its own rights and in the rights of its nationals. Germany is therefore entitled to invoke the international responsibility of the United States, independently of any question of domestic "prejudice".

III. Pronouncement of the wrongfulness of the conduct of the United States as a form of satisfaction

6.47 Germany now turns to the substance of its entitlement to reparation. As already stated, reparation is the normal consequence of a violation of international law. According to ILC draft article 42 (1) – which is in full accordance with the *Chorzów Factory* Judgment of the Permanent Court[556] –

1998, Uncorrected Verbatim Record, CR 98/7, para. 2.18 (Ms. Brown).

[556] See *supra* note 510. *Cf.* also U.S. Comments, *supra* note 504, at pp. 479 f. with further

> "[t]he injured State is entitled to obtain from the State which has committed an internationally wrongful act full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition, either singly or in combination."[557]

As the Commentary to the draft article explains:

> "In the *Chorzów Factory* case, material damage had been sustained and the Court therefore singled out only two methods of reparation, ... There are however other methods of reparation which are appropriate to injuries of a non-material nature, namely satisfaction and assurances or guarantees of non-repetition."[558]

Therefore, both of the remedies requested by Germany – a pronouncement of the illegality of the conduct of the United States and the provision of guarantees of non-repetition – constitute recognised forms of reparation. These remedies are not mutually exclusive. In the following, Germany will first explain why a pronouncement of the wrongfulness of the United States conduct is an appropriate remedy. Following this, Germany will prove that all the conditions for satisfaction in the form of a pronouncement of illegality are fulfilled in the present case.

1. Pronouncement of wrongfulness as a form of satisfaction

6.48 According to ILC draft article 45,

> "[t]he injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, caused by that act, if and to the extent necessary to provide full reparation."

In its commentary to this article, the ILC affirms that

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references.

[557] See *supra* note 484, at p. 141.

[558] ILC Commentary, *supra* note 513, at p. 59 (para. 3).

> "satisfaction ... has a place both in literature and in international jurisprudence, namely recognition by an international tribunal of the unlawfulness of the offending State's conduct."[559]

6.49 The most important pronouncement in this respect stems from the Judgment of the International Court of Justice in the *Corfu Channel* Case. There the Court stated that

> "the United Kingdom violated the sovereignty of the People's Republic of Albania, and that this declaration by the Court constitutes in itself appropriate satisfaction."[560]

The Permanent Court of International Justice described one of the purposes of such a declaration of wrongfulness in the following terms:

> "The Court's Judgment ... is in the nature of a declaratory judgment, the intention of which is to ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned."[561]

Recently, on 30 April 1990, in the *Case concerning the Rainbow Warrior Affair* between New Zealand and France, the Arbitral Tribunal explained that

> "[t]here is a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy or form of reparation (in the wide sense) for the breach of an international obligation. This practice relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities."[562]

Accordingly, the Arbitral Tribunal came to the conclusion

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[559] *Ibid.*, at p. 79 (para. 10), footnotes omitted. For further references, see *ibid.*, at p. 79 notes 305 f. See also I. Brownlie, *Principles of Public International Law* (5th ed. 1998), p. 462, who distinguishes between a judicial pronouncement as a form of satisfaction and purely declaratory judgments.

[560] *Corfu Channel Case (Merits), I.C.J. Rep. 1949*, p. 4.

[561] *Interpretation of Judgments Nos. 7 and 8 (The Chorzów Factory), P.C.I.J., 1927, Series A, No. 13*, p. 20.

[562] 20 *Reports of International Arbitral Awards*, pp. 272 f. (para. 122).

> "that the condemnation of the French Republic for its breaches of its treaty obligations to New Zealand, made public by the decision of the Tribunal, constitutes in the circumstances appropriate satisfaction for the legal and moral damage caused to New Zealand."[563]

Only recently, on 1 July 1999, the International Tribunal for the Law of the Sea confirmed that

> "[r]eparation in the form of satisfaction may be provided by a judicial declaration that there has been a violation of a right."[564]

6.50 Pursuant to these pronouncements, the declaration of the wrongfulness of certain conduct by the Court has a twofold function: (1) It interprets a disputed point of law in a definitive way binding upon the parties, and (2) it provides satisfaction to the injured party. Germany requests the declaration of wrongfulness of the conduct of the United States in the present case for both of these purposes.

As an author observed on arbitral jurisprudence concerning satisfaction,

> "where the satisfaction is non-pecuniary there is no problem. Thus ... a declaratory judgment was held to constitute adequate satisfaction for violation of state sovereignty, ..."[565]

Thus, both the jurisprudence of the International Court and that of other international judicial bodies confirm that satisfaction in the form of a pronouncement of wrongfulness is an appropriate remedy in international law.

2. Conditions of satisfaction

6.51 Germany's claim to satisfaction also fulfils the conditions under general international law as restated in article 45 of the ILC draft: First, Germany must have suffered moral damage by the conduct of the United States. Second, this damage must have been caused by the conduct of the United States. Third, satisfaction must be necessary in order to provide full reparation. Fourth, the demand for the pronouncement of wrongfulness must not impair the dignity of the United States. In the following, Germany will set out these conditions in detail.

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[563] *Ibid.*, at 275.

[564] *M/V "Saiga" (No. 2), supra* note 503, para. 171.

[565] C. Gray, *Judicial Remedies in International Law* (1987), p. 42.

a) Moral damage suffered by Germany because of the internationally wrongful acts of the United States

6.52 The first condition mentioned in ILC draft article 45 is "damage, in particular moral damage" done to Germany. The damage referred to in draft article 45 is not material damage, but "moral" or "political" damage ensuing from a violation of an international legal right of the injured State; "injury" in this context understood as injury to the dignity, honour, prestige and/or legal sphere of the State affected by an internationally wrongful act.[566] The ILC Commentary further specifies that

> "[t]he all-embracing phrase 'damage, in particular moral damage' is intended to convey the notion that the kind of injury for which satisfaction operates ... consists in any non-material damage suffered by a State as a result of an internationally wrongful act."[567]

6.53 Germany has suffered damage of this kind in the present case in several respects. First of all, Germany has suffered moral and political damage by the fact alone that its rights and the rights of its nationals were violated by the United States as set out in Part Four of the present Memorial. That a violation of the rights of a State gives rise to moral and political damage regardless and independent of any material injury is generally recognised. In the words of Dionisio Anzilotti:

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[566] Commentary to draft article 45, in: *Yearbook of the International Law Commission* 1993, vol. II part 2, p. 77 (para. 4).

[567] *Ibid.*, para. 5.

> "The essential element in inter-State relations is not the economic element, although the latter is, in the final analysis, the substratum; rather, it is an ideal element, honour, dignity, the ethical value of subjects. The result is that, when a State sees that one of its rights is ignored by another State, that mere fact involves injury that it is not required to tolerate, even if material consequences do not ensue; ... "[568]

6.54 However, the violation of Germany's rights does not exhaust the immaterial damage caused by the wrongful conduct of the United States. The United States has caused additional moral and political damage to Germany by its disregard for Germany's interventions on behalf of its nationals: Germany intervened in favour of the LaGrand brothers several times to the U.S. authorities, the President, the Department of State, the Justice Department, and the authorities of the State of Arizona, by way of written and oral submissions from its own highest authorities – the Bundespräsident (President, *i.e.*, the Head of State of Germany), the Bundeskanzler (Federal Chancellor, that is, the Head of Government), the Foreign Minister, the Minister of Justice, the Ambassador to the United States and the Consul General in Los Angeles – requesting respect for the rights of Germany and the LaGrands under Art. 36 of the Vienna Convention, as well as for the Order of the Court of 3 March 1999, and invoking several compelling reasons for granting clemency that would have spared the brothers from the death penalty, but to no avail.[569] Germany has even taken the extraordinary step of lodging an application against the United States and the Governor of Arizona before the U.S.

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[568] D. Anzilotti, *Corso di diritto internazionale*, vol. 1 (4th ed. 1955), p. 404. The passage is cited according to the English translation in the ILC Commentary to Art. 45, *supra* note 566, at p. 77 (para. 4), emphasis of the Commission removed. The Italian original reads: "Il momento essenziale dei rapporti tra gli Stati non è il momento economico, anche se questo ne costituisce, in ultima analisi, il sustrato; è piuttosto un momento ideale; l'onore, la dignità, il valore etico dei subietti. Ne segue che il solo fatto che uno Stato veda disconosciuto da un altro Stato un suo diritto, implica un danno che esso non può essere tenuto a sopportare, quand'anche non sieno per derivarne conseguenze materiali: ... ." For further references see ILC Commentary, *ibid.*

[569] See the Statement of Facts, Part Two of the present Memorial.

Supreme Court.[570] The Governor of Arizona ignored not only these interventions, but in the case of Walter LaGrand also the Order of the International Court of Justice as well as the recommendation of the Arizona Board of Executive Clemency to postpone the execution in order to gain time to duly consider the matter.[571] As to the U.S. Federal Government, not only did it completely ignore the requests of the German Government, its Solicitor General even argued before the Supreme Court in favour of simply ignoring the Order of this Court of 3 March 1999 and against any federal interference in the course leading to the death of Walter LaGrand.[572] In contrast, in comparable cases concerning nationals of other countries, the U.S. Federal Government has at least asked the local authorities to halt the execution.[573] In the present Case, the United States did not even conform to what it itself expressly considers to be required if a breach of Art. 36 of the Vienna Convention occurs: In his brief to the U.S. Supreme Court in the *Breard* Case, the U.S. Solicitor General declared:

> "The State Department has accorded Paraguay the traditional remedy among nations for failures of consular notification: it has investigated the facts, determined that there was a breach, formally apologized on behalf of the United States, and undertaken to improve future compliance."[574]

In the Case of the LaGrand brothers, the United States has done nothing of that sort, let alone fulfilled its obligation to grant *restitutio in integrum* under the applicable law of State responsibility.

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[570] See *supra* note 32 and accompanying text as well as ANNEX 27.

[571] See Statement of Governor Hull, ANNEX 33.

[572] See the letter of the Solicitor General to the U.S. Supreme Court, ANNEX 28.

[573] *Cf.* letters of Secretary of State Albright to the Governor of the Commonwealth of Virginia in the case of the Paraguayan Angelo Breard (ANNEX 37) and to the Chairman of the Texas Board of Pardons and Paroles in the case of the Canadian national Stanley Faulder, ANNEX 61.

[574] 1997 U.S. Briefs 1390, ANNEX 34, at p. 13.

6.55 Thus, the United States authorities almost completely disregarded the concerns and interventions by Germany directed against the violations of its rights and the rights of its nationals. Therefore, the United States caused considerable political and moral damage to Germany. This damage to Germany was so considerable as to justify a demand for satisfaction in the form of a pronouncement of the wrongfulness of the conduct of the United States.

b) Causation

6.56 Germany will now address the issue of causality. ILC draft article 45 (1) stipulates:

> "The injured State is entitled to obtain from the State which has committed an internationally wrongful act satisfaction for the damage, in particular moral damage, *caused by that act*, ..."[575]

In the words of the ILC commentary, causation in this connection means

> "the presence of a clear and unbroken causal link between the unlawful act and the injury for which damages are being claimed. For injury to be indemnifiable, it is necessary for it to be linked to an unlawful act by a relationship of cause and effect and an injury is so linked to an unlawful act whenever the normal and natural course of events would indicate that the injury is a logical consequence of the act or whenever the author of the unlawful act could have foreseen the damage it caused."[576]

This statement is meant to apply to all cases where causation is considered a condition for a remedy[577] and thus also comprises the case of satisfaction.

6.57 In the present instance, the damage described above was caused by the United States. As far as the moral damage resulted from the treaty violations committed by the United States *per se*, causation is self-evident. The causal link between the unlawful acts and the further political and moral damage Germany has incurred is also obvious: If the United States had respected Art. 36 of the Vienna Convention and/or the Order of the Court, Germany would not have incurred moral or political damage.

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[575] *Supra* note 484, at p. 143; emphasis added.

[576] Commentary to draft article 44, *Yearbook of the International Law Commission* 1993, vol. II part 2, at p. 69 (para. 7), footnote omitted.

[577] See also the reference in the ILC Commentary to draft article 42, *Yearbook of the*

c) Necessity of the pronouncement

6.58 According to ILC draft article 45 (1), the necessity of the required measure of satisfaction for full reparation constitutes a further condition for the right to satisfaction. In the present case, in which the Respondent apparently denies any violation of international law, the content and impact of those violations is obviously subject to dispute. Therefore, a pronouncement on the wrongfulness of the conduct of the United States is absolutely necessary in order to restore and secure Germany's rights under the Vienna Convention. Such a pronouncement will counter the public impression that the United States can violate the rights of Germany and its nationals without any consequences. Therefore, the integrity of Germany's rights will only be restored if the Court pronounces with binding force the wrongfulness of the conduct of the United States.

3. Conclusion

6.59 For all of these reasons, Germany requests that the Court pronounce the wrongfulness of the conduct of the United States, as set out in Part Four of the present Memorial, as a form of satisfaction.

International Law Commission 1993, vol. II part 2, at p. 59 (para. 6).

IV. Assurances and guarantees of non-repetition

6.60 Germany also demands guarantees of non-repetition in order to prevent further violations of its rights and those of its nationals in the future. The United States itself has always insisted – and rightly so – that compensation for violations of its rights under international law is not sufficient, and that the wrongdoing State must also ensure the respect of its international obligations in the future. As President Lyndon B. Johnson affirmed on the occasion of attacks against the United States embassy in Moscow in 1964 and 1965:

> "The U.S. Government must insist that its diplomatic establishment and personnel be given the protection which is required by international law and custom and which is necessary for the conduct of diplomatic relations between states. Expressions of regret and compensation are no substitute for adequate protection."[578]

The same is valid, *mutatis mutandis*, for the rights of Germany and its nationals on the territory of the United States based on Art. 36 of the Vienna Convention on Consular Relations. In this context, assurances and guarantees of non-repetition are of particular importance because the execution of the LaGrand brothers rendered retroactive relief such as *restitutio in integrum* impossible.

6.61 Unlike satisfaction and reparation in general, assurances and guarantees of non-repetition do not look to the past but to the future. They are recognised as a separate remedy in customary international law, as expressed in the ILC's draft article 46 which stipulates as follows:

> "Assurances and guarantees of non-repetition
>
> The injured State is entitled, where appropriate, to obtain from the State which has committed an internationally wrongful act assurances or guarantees of non-repetition of the wrongful act."[579]

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[578] 4 *International Legal Materials* (1965), p. 698, reproduced in: Commentary to draft article 43, *Yearbook of the International Law Commission* (1993), vol. II part 2, p. 82 (para. 2).

[579] Draft articles on State responsibility, in: ILC Report 1996, *supra* note 484, at p.143.

6.62 This provision is in full accordance with international practice and doctrine. As Professor Przetacznik remarks:

> "En général, dans tous les cas de préjudices de caractère moral et politique, l'État lésé, entre autres formes de satisfaction demande des assurances de sécurité pour l'avenir, ce qui signifie que l'État intéressé s'acquittera avec plus de diligence ou plus d'efficacité de son devoir de protection."[580]

Only recently, on 1 July 1999, the International Tribunal for the Law of the Sea, referring to draft article 42 (1), explained that

> "[r]eparation may be in the form of 'restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition either singly or in combination'".[581]

The ILC Commentary to draft article 46 explains that

> "[t]he text adopted by the Commission provides that the injured State is entitled, where appropriate, to obtain from the wrongdoing State assurances or guarantees of non-repetition. It therefore recognizes that the wrongdoing State is under an obligation to provide such guarantees subject to a demand from the injured State and when circumstances so warrant. Circumstances to be taken in consideration include the existence of a real risk of repetition and the seriousness of the injury suffered by the claimant State as a result of the wrongful act."[582]

6.63 Thus, assurances and guarantees of non-repetition are subject to two conditions: (1) A respective demand from the injured State; and (2) circumstances warranting those guarantees, in particular the existence of a risk of repetition and the seriousness of the injury.

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[580] F. Przetacznik, La responsabilité internationale de l'État à raison des préjudices de caractère moral et politique causés à un autre État, 78 *Revue Générale de Droit international public* (1974), pp. 966 f., and the examples cited therein. See also, *inter alia*, R. Jennings, A. Watts (eds.), *Oppenheim's International Law*, vol. 1 (9th ed. 1992), p. 532, and the judgment cited there in note 14; Brownlie, *Principles, supra* note 559, at p. 463 (counting guarantees among measures of satisfaction). See also the judgments cited in the Commentary to draft article article 46, *Yearbook of the International Law Commission* (1993), vol. II part 2, pp. 81 ff. and *infra*.

[581] *M/V "Saiga" (No. 2), supra* note 503, para. 171.

[582] See ILC Commentary, *supra* note 580, at p. 83 (para. 5).

To those conditions Germany will now turn.

1. The demand of Germany

6.64 In its submissions contained in the final Part of the present Memorial, Germany, as the injured State, puts forward its demand for assurances and guarantees of non-repetition in the following terms:

> "The Federal Republic of Germany respectfully requests the Court to adjudge and declare ...
> that the United States shall provide Germany a guarantee that it will not repeat its illegal acts and ensure that, in any future cases of detention of or criminal proceedings against German nationals, United States domestic law and practice will not constitute a bar to the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations."

6.65 State practice knows two kinds of demands for guarantees: (1) demands for safeguards against the repetition of the wrongful act without any specification, and (2) demands for specific measures to secure that the future conduct of the wrongdoing State will be in compliance with international law.[583]

6.66 Thus, in the sense of the first alternative and to begin with an instance of U.S. practice, in four cases involving the visitation and search of American merchant vessels by Spanish armed cruisers in 1880, the U.S. Secretary of State Evarts declared:

> "[T]his government will look to Spain for a prompt and ready apology for their occurrence [of the unlawful acts], *a distinct assurance against their repetition*, and such an indemnity to the owners of those several vessels as will satisfy them for the past and *guarantee our commerce against renewed interruption by engaging the interest of Spain in restraint of rash or ignorant infractions, by subordinate agents of its power, of our rights upon the seas.*"[584]

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[583] *Ibid.*, at p. 82 (paras. 3 and 4), with further references; Przetacznik, *supra* note 580, at pp. 967 f.

[584] Letter of Secretary of State Evarts to the Minister to Spain, Mr. Fairchild, of 11 Aug.

To mention the practice of other States: In the case of an attack against the Chinese Consulate General at Jakarta in March 1966, the Chinese Deputy Minister for Foreign Affairs, Mr Hang Nien-Lung, requested in a note to the Indonesian Ambassador in China, Mr Djawoto, *inter alia*,

> "une garantie contre tout renouvellement de pareils incidents à l'avenir."[585]

After an attack on an Israeli civil aircraft carried out in Zurich on 18 February 1969,

> "the Swiss Government delivered formal notes of protest to Jordan, Syria, and Lebanon in which the attack at Zurich was condemned and in which each of the three governments was urged to take steps 'to prevent any new violations of Swiss territory'."[586]

In these instances, the choice of the appropriate measures remained with the wrongdoing State.

6.67 According to the second of the above-mentioned alternatives, the injured State may demand the adoption of specific measures by the wrongdoing State. The ILC Commentary lists three non-exhaustive categories of such specific measures, namely demands for

(1) formal assurances,

(3) specific instructions to agents of the wrongdoing State, and

(4) certain conduct by the wrongdoing State, in particular the adoption or abrogation of specific legislative provisions.[587]

1880, in: J. Moore (ed.), *A Digest of International Law* (1906), vol. 2, pp. 907 f., emphasis added.

[585] Note of 11 March 1966, 70 *Revue Générale de Droit international public* (1966), p. 1013.

[586] R. Falk, The Beirut Raid and the International Law of Retaliation, 63 *American Journal of International Law* (1969), p. 419.

[587] Commentary to draft article 46, *supra* note 580, at pp. 82 f. (para. 4).

6.68 The most prominent example pertaining to the third group, which is of particular significance in the present instance, is the *Trail Smelter* Case, in which an Arbitral Tribunal was empowered to create a detailed régime of environmental protection in order to "effectively prevent future significant fumigations in the United States".[588] In the case of *A. K. Cutting*, it was the United States which demanded the change of a Mexican law granting universal jurisdiction to Mexican criminal courts for alleged crimes committed by foreigners abroad. Pursuant to this law, the United States citizen Mr. Cutting was imprisoned in Mexico for an alleged offence committed in the United States. Following Cutting's arrest, the United States not only demanded his immediate release but also a change of Mexican law. As U.S. President Cleveland told Congress on 8 December 1886,

> "I trust that in the interests of good neighborhood the statute referred to will be so modified as to eliminate the present possibilities of danger to the peace of the two countries."[589]

U.S. Secretary of State Bayard instructed the United States ambassador in Mexico as follows:

> "You are therefore instructed to say to the Mexican Government, not only that an indemnity should be paid to Mr. Cutting for his arrest and detention in Mexico on the charge of publishing a libel in the United States against a Mexican, but also, in the interests of good neighborhood and future amity, that the statute proposing to confer such extraterritorial jurisdiction should, as containing a claim invasive of the independent sovereignty of a neighboring and friendly state, be repealed."[590]

As the Secretary of State explained, such a demand was not exceptional. The United States itself had amended its laws to meet international standards:

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[588] *Trail Smelter Case (Canada v. United States)*, Award of 16 April 1938, 3 *Reports of International Arbitral Awards*, p. 1934.

[589] Annual Message, 6 December 1886, in: J. Moore, *A Digest of International Law* (1906), vol. 2, p. 232.

[590] Correspondence with Mr. Connery, Chargé to Mexico, Nov. 1, 1887, *ibid.*, at p. 238.

> "Nor is a change of municipal law to meet the exigencies of international intercourse without precedent in the United States. In the case of McLeod, in 1842, when, in reply to the demand of the British Government for the release of the prisoner ... this Government was compelled to return a reply not dissimilar to that made by Mr. Mariscal ... . Congress amended the law regulating the issuance of writs of habeas corpus so as to facilitate the performance by the Government of the United States of its international obligations. So that nothing is suggested to the Government of Mexico in this relation which has not been put in practice by the Government of the United States."[591]

6.69 Recent examples of demands for the change of domestic legislation stem from international institutions for the protection of human rights, such as the Human Rights Committee overseeing the implementation of the International Covenant for Civil and Political Rights.[592] For instance, in its decision of 23 July 1980 in the *Torres Ramirez* Case under Article 5 (4) of the Optional Protocol to the Covenant,[593] the Human Rights Committee adopted the following view:

> "The Committee, accordingly, is of the view that the State party is under an obligation to provide the victim with effective remedies, including compensation, for the violations which he has suffered and to take steps to ensure that similar violations do not occur in the future."[594]

Following these precedents, Germany would even be entitled to demand an express change of United States domestic law as a guarantee of non-repetition.

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[591] *Ibid.*, at p. 239.

[592] International Covenant on Civil and Political Rights of 19 December 1966, 999 *UNTS*, p. 171.

[593] Optional Protocol to the International Covenant on Civil and Political Rights of 19 December 1966, 999 *UNTS*, p. 302.

[594] *General Assembly Official Records*, Thirty-fifth Session, Suppl. No. 40, UN Doc. A/35/40, p. 126 (para. 19). For further examples, see the *Lanza* case, Decision of 3 April 1980, *ibid.*, p. 119 (para. 17) and the *Dermit Barbato* case, Decision of 12 October 1982, *General Assembly Official Records*, Thirty-eighth Session, Suppl. No. 40, UN Doc. A/38/40, p. 133 (para. 11).

6.70 The German request for "formal" assurances is appropriate in the present Case if only because it will be decided by the International Court of Justice after a formal procedure. In addition, since all informal requests of Germany, and even the formal Order of the Court on Provisional Measures were ignored by the United States, Germany cannot be content any longer with mere informal assurances on the part of the United States.

6.71 In precise terms, Germany demands formal assurances that the United States will bring its practice in conformity with the requirements of international law, without laying out in detail whether these modifications are to be brought about by formal changes in its domestic law or simply by changing the practical application of its respective legislation. Nevertheless, Germany wishes to emphasise that the result of the endeavour must be complete conformity of United States conduct with Art. 36 of the Vienna Convention on Consular Relations. By so couching its demand, Germany on the one hand seeks to ensure that the United States will respect Germany's rights and the rights of its nationals in the future. On the other hand, Germany has no intention to unnecessarily interfere with the domestic legal system of the United States. Thus, the choice of means is left to the United States.

2. Circumstances requiring the pronouncement of assurances and guarantees of non-repetition

6.72 According to ILC draft article 46, guarantees of non-repetition are to be accorded only "where appropriate". The Commentary explains that

> "[c]ircumstances to be taken in consideration include the existence of a real risk of repetition and the seriousness of the injury suffered by the claimant State as a result of the wrongful act."[395]

As Germany will show, both circumstances mentioned in the ILC Commentary are present in our case.

a) Risk of repetition

6.73 In the present context, the primary evidence pointing to a risk of repetition is to be seen in the fact that the present Case is the second instance within less than one year in which the International Court of Justice had to deal with the omission of consular advice and notification by the United States.[596]

6.74 Secondly, as already pointed out in Part Four of the present Memorial, Germany knows of at least eight more cases in the very recent past in which advice by its consulates could not be provided due to a lack of information from the United States authorities.[597] In addition, it is in the nature of such lack of information that Germany will not be, and probably never will become, aware of all or even most of the cases concerned due to what amounts to almost a pattern of failure by the U.S. authorities to properly inform German nationals arrested and detained of their rights.

6.75 Thirdly, as the Arizona authorities have themselves admitted, they knowingly refrained from informing the LaGrand brothers about their rights. As was set out in Part Four in necessary detail, due to the denial of remedies against such failure of information in United States procedural law, even such intentional disregard of the rights of German citizens under international law cannot be remedied once a jury trial has taken place. As long as United States domestic law encourages the omission of information on consular access on the part of the authorities rather than prevents it, to the disadvantage of the defence, such violations of the rights under Art. 36 of the Vienna Convention will certainly occur time and again as long as these laws and practices are not changed.

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[595] Commentary to draft article 46, *supra* note 580, at p. 83 (para. 5).

[596] See *Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, Order of 9 April 1998, I.C.J. Reports 1998*, pp. 248 ff.

[597] See Part Four, n. 153 and accompanying text.

b) Seriousness of the injury suffered by Germany

6.76 As set out in detail above,[598] the intentional disregard of Germany's rights and the rights of its nationals, and the consistent refusal of United States authorities, whether federal, state or local, whether executive or judicial, to respect Germany's rights and the rights of its nationals under Art. 36 of the Vienna Convention in spite of Germany's interventions, have created serious political and moral injury to Germany. The present Case involves not "only" the lives of two German nationals, executed in breach of international law and of an Order of the highest Jurisdiction of the world. Its significance goes far beyond that. Ultimately, this Case deals with the question of whether German nationals present on the territory of the United States can effectively assert their rights. Therefore, Germany's injury is serious.

3. Conclusion

6.77 Germany's demand for assurances and guarantees of non-repetition meets all the requirements of ILC draft article 46 and the customary international law of State responsibility. It is in the interest neither of the United States nor of Germany – nor of the Court, for that matter – that Germany appears again and again in this forum to ascertain its rights and the rights of its nationals. The appropriate remedy under these circumstances is the provision of guarantees and assurances of non-repetition.

V. No circumstances precluding these remedies

6.78 The ILC draft contains several factors which preclude satisfaction even if the normal prerequisites for such a remedy were present. In the following,

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[598] See *supra*, Part Six, Ch. III 2 a).

Germany will prove that none of these circumstances affect the appropriateness of the remedies sought in the present Case.

1. No impairment of the dignity of the United States

6.79 According to ILC draft article 45 (3),

> "[t]he right of the injured State to obtain satisfaction does not justify demands which would impair the dignity of the State which has committed the internationally wrongful act."[599]

Even though it is not expressly mentioned in draft article 46, the ILC considers this condition applicable to assurances and guarantees of non-repetition as well.[600]

Whether this requirement follows from already existing international law on the matter may be doubtful.[601] In any case, no such impairment of the dignity of the United States is involved in the present Case. Germany has taken utmost care to respect the dignity of the Respondent by not requesting any remedy that could offend the United States. What Germany maintains are two requests which both fully respect the dignity of the United States:

6.80 (1) The pronouncement of the wrongfulness of the conduct of the United States is indispensable for ensuring respect of Germany's rights and the rights of its nationals in the future. The entire task of the International Court of Justice consists in upholding the rule of law in international relations. A pronouncement of the Court on the legality or illegality of this or that conduct can never impair the dignity of the members of the international community but only restore the integrity of the international legal system. The dignity of the members of this community can only be maintained when international law is fully respected.

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[599] *Supra* note 484, at p. 143.

[600] See ILC Commentary, *supra* note 580, at p. 83 (para. 5).

[601] *Cf.* United States Comments on the Draft articles on State responsibility, 37 *International Legal Materials* (1998), pp. 482 f.

6.81 (2) This argument is also valid for guarantees of non-repetition which are to ensure that Germany's rights and the rights of its nationals will be respected in the future.

2. No contribution of Germany or its nationals to the damage caused

6.82 ILC draft article 42 (2) mentions another circumstance to be taken into account:

> "In the determination of reparation, account shall be taken of the negligence or the wilful act or omission of:
>
> (a) the injured State; or
> (b) a national of that State on whose behalf the claim is brought;
>
> which contributed to the damage."[602]

6.83 The customary law character of this condition may be doubtful.[603] But it is obvious that neither Germany as the injured State, nor the LaGrand brothers contributed in any way to the damage caused to Germany and the brothers themselves by the non-fulfilment of the international legal duties of the United States. After becoming aware of the German nationality and the detention of the LaGrand brothers, Germany assisted the brothers and their attorneys in raising the omission of information on the right to consular access by the Arizona authorities. As Germany has described above, after the brothers had become aware of their German nationality, they raised the violation of Art. 36 of the Vienna Convention in both state and federal Courts. However, in every instance from the Arizona Superior Court to the U.S. Supreme Court, their claim to a new trial or a new sentencing hearing was rejected as "procedurally defaulted".[604]

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[602] Draft articles on State responsibility, *supra* note 484, at p. 141.

[603] Cf. the United States comments, *supra* note 504, at pp. 478 f.

Thus, Germany and the LaGrand brothers did everything at their disposal to prevent the damage from arising. Therefore, the United States alone is responsible for the damage caused to Germany.

3. The domestic law of the United States providing no justification for failure to provide reparation

6.84 Germany's entitlement to a pronouncement of the wrongfulness of United States conduct in the present Case and to guarantees of non-repetition do not depend on the current state of United States domestic law. As Germany has already explained above, it is a universally recognised principle of international law that, in the words of Art. 27 of the 1969 Vienna Convention on the Law of Treaties,

> "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[605]

This is no different in the case of international legal remedies requiring a change of domestic law. As Germany has explained above, the guarantees which it requests leave the choice of means, especially the answer to the question whether future compliance with the relevant obligations of the United States requires changes of domestic law, to the United States itself. However, if the result is that the United States will only be able to meet the requirements of the Vienna Convention if it effects changes to its law, it will have to do so. As ILC draft article 42 (4) puts it:

> "The State which has committed the internationally wrongful act may not invoke the provisions of its internal law as justification for the failure to provide full reparation."[606]

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[604] For details see *supra*, Part Four, Ch. I 3 b (2).

[605] For details see *supra*, Part Five, Ch. II.

Analysing certain arbitral awards in which compensation instead of *restitutio* was awarded, the Commission concludes:

> "The Commission would however tend to view those decisions as based on excessive onerousness or lack of proportion between the injury caused and the burden represented by a specific form of reparation rather than on obstacles deriving from municipal law."[607]

6.85 An argument to the effect that the provision of guarantees by the United States to implement the international obligations relevant here in the future would place an excessive burden on the United States essentially amounts to an admission that the United States is incapable of keeping its obligations under the Vienna Convention. Such an admission cannot excuse breaches of international law, however. In the words of the International Law Commission:

> "Any State which is well aware of its international obligations – secondary as well as primary – is bound to see to it that its legal system, not being opposable to the application of international legal rules, is adapted or adaptable to any exigencies deriving from such rules. ... The juridical obstacles of municipal law are, strictly speaking, factual obstacles from the point of view of international law. Hence they should not be treated as strictly legal obstacles in the same sense as obstacles deriving from international legal rules."[608]

Thus, even if the choice of means of how to fulfil its international legal obligations is within the discretion of the United States – that is, as far as no specific method of implementation is required by a rule of international law –, a State cannot invoke its internal law as justification to disregard its obligations under international law.

6.86 An analysis strictly limited to the international legal aspects of the question might stop at this point. After all, the domestic law of the United States is not a matter for this Court to review – except if expressly provided otherwise, like in Art. 36 (2) of the 1963 Vienna Convention. Nevertheless, Germany

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[606] Draft articles on State responsibility, *supra* note 484, at p. 142.

[607] ILC Commentary, *supra* note 580, at p. 61 (para. 14).

emphasises that nothing requested in the present Memorial will force the United States to act contrary to its Constitution, or would otherwise do violence to any principle of United States law. However, especially in view of Art. 36 (2) of the Vienna Convention, certain changes of U.S. domestic law regarding rights of foreigners in the United States might well be necessary.

In this regard, the following points merit particular emphasis:

6.87 (1) Concerns of federalism are not relevant to the performance of international legal obligations. According to a well-known statement of the U.S. Supreme Court,

> "in respect of our foreign relations generally, state lines disappear. As to such purposes, the state of New York [or, one might add, the state of Arizona] does not exist."[609]

(2) The Federal Government has several measures at its disposal of how to ensure compliance by states with the obligations of the United States derived from Art. 36 (1) of the Vienna Convention. These measures include, *inter alia*,

(a) The President of the United States could use his or her power, "to take Care that the Laws be faithfully executed", which the United States Constitution obliges him or her to do in Art. 2 Sect. 3, to intervene in the case of non-compliance with international law on the part of the states. Several authorities in U.S. constitutional and foreign relations law have emphasised that such action would be possible, either by Executive Order or by suing the state concerned before a federal court.[610]

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[608] ILC, *supra* note 513, at p. 61 (para. 15).

[609] *U.S. v. Belmont*, 301 U.S. 324, 331 (1937) (Sutherland, J.). For an extensive treatment of the relationship between international law and U.S. federalism see L. Henkin, *Foreign Affairs and the United States Constitution* (2d ed. 1996), pp. 149 ff.

[610] To this effect, see L. Henkin, Provisional Measures, U.S. Treaty Obligations, and the States, 92 *American Journal of International Law* (1998), p. 681; C. Vázquez, Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures, *ibid.*, at pp. 683 ff.

(b) The United States Congress could change the Antiterrorism and Effective Death Penalty Act of 1996,[611] in order to allow suits against the disregard of the right to consular information in federal courts.

(c) The United States Congress could issue legislation authorising suits for damages for failure of federal or state authorities to comply with the Vienna Convention.

(d) The U.S. Congress could use its power of "conditional preemption" to permit states the arrest of foreign nationals only if the states provide notice upon arrest of the right of consular notification.[612]

(e) The U.S. courts could interpret the Antiterrorism and Effective Death Penalty Act and the procedural default rule in accordance with the requirements of international law pursuant to the so-called *Charming Betsy* rule. This rule derives its name from an early Supreme Court decision in which the Court stated that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains".[613]

(f) The U.S. courts should, if not as a matter of law at least as a matter of comity, respect binding Orders of this Court in line with the "global allocation of judicial responsibility", as Professor Anne-Marie Slaughter has put it.[614]

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[611] For details concerning this act, see *supra* Part Four, Ch. I.

[612] For details see F. Kirgis, Zschnering v. Miller and the Breard Matter, 92 *American Journal of International Law* (1998), pp. 704 ff.; C. Vázquez, Breard, Printz, and the Treaty Power, 70 *Colorado Law Review* (1999), pp. 1324 ff.

[613] *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); J. Paust, Breard and Treaty-based Rights Under the Consular Convention, 92 *American Journal of International Law* (1998), p. 692. On this canon of interpretation see also *Restatement of the Law (Third), The Foreign Relations Law of the United States* (1987), vol. 1, p. 62 (§ 114).

[614] A.-M. Slaughter, Court to Court, 92 *American Journal of International Law* (1998), p. 708.

6.88 All of these measures would be fully consistent with the constitutional structure and governing legal principles of the United States. It is unnecessary for the International Court of Justice to endorse any particular means of ensuring more effective compliance. What is important is that the United States Federal Government is perfectly capable of enforcing compliance with the Vienna Convention through its own agencies as well as through states and thus to give the assurances requested by Germany.

6.89 As Germany itself is a federal State, it has a great deal of respect for the federal system of the United States, which has provided the framers of its own constitution, the *Grundgesetz*, with invaluable inspirations. The pronouncement Germany seeks from the world's highest Jurisdiction does not encroach upon the internal legal system of the United States and its freedom to choose the means of implementing its international obligations. However, it is a universally accepted proposition that a State must not and cannot invoke its federal system as an excuse for the non-performance of its international obligations. Therefore, the United States cannot invoke federalism as a justification for disregarding the rights of Germany and its nationals. The same is valid regarding the implementation of the remedies decided upon by the International Court of Justice. The United States is obliged to comply with Judgments of the Court pursuant to Art. 94 (1) of the United Nations Charter and Art. 41 (1) of the Statute of the Court. According to Art. VI sect. 2 of the United States Constitution, treaties constitute "the supreme Law of the Land". Thus, a pronouncement of this Court could help to ensure the implementation of Art. 36 of the Vienna Convention by the U.S. federal, state and local authorities and the legislative, judicial and executives branches.

VI. Conclusion

6.90 For the reasons thus given, Germany's claims to remedies for the breaches of international law committed by the United States are fully supported by the law of State responsibility. The United States may not invoke its dignity, its internal law, or any other consideration in order to evade the consequences of these remedies.

6.91 In specific terms, pursuant to international law, Germany has a right to demand the following remedies from the United States:

(1) A pronouncement of the wrongfulness of the conduct of the United States towards Germany and its citizens described in Part Four of the present Memorial;

(2) the provision of assurances and guarantees of non-repetition of such wrongful conduct towards Germany and its citizens.

Part Seven

Conclusions and Submissions

I. Conclusions

7.01 On the basis of the foregoing, the Federal Republic of Germany arrives at the following conclusions:

(1) Since the present dispute arises out of the interpretation and application of the Vienna Convention on Consular Relations, it falls within the scope of Article I of the Optional Protocol to the Convention. Accordingly, the International Court of Justice has jurisdiction to hear all claims brought by the Federal Republic of Germany in its Application of 2 March 1999, as modified in the following Submissions.

(2) Neither the timing of the German Application nor the fact of the execution of Walter LaGrand subsequent to its filing stand in the way of the admissibility of the Application.

(3) By not informing Karl and Walter LaGrand of their right to have the authorities of the United States notify the German consulate of their arrest and detention, and by thus not providing the consulate with access to them, the United States has violated the following obligations embodied in Art. 36 (1) of the Vienna Convention on Consular Relations:

(a) The obligation to advise the LaGrands without delay about their right to inform the German consulate of their arrest in accordance with Art. 36 (1) (b) of the Vienna Convention;

(b) The obligation to grant the German consulate the freedom of communication with its nationals, including its right to visit, and, *vice versa*, the obligation to grant the brothers LaGrand the freedom to communicate with and have access to the German consulate, according to Art. 36 (1) (a) and (c) of the Convention.

Had these violations not occurred, German consular officials would have immediately provided protection, support and assistance to their nationals, helping in the preparation of their defence, in obtaining competent counsel and in collecting mitigating evidence. Thus, the case of the LaGrands would have been thoroughly investigated and essential mitigating evidence, mainly located in Germany, would have been presented at the decisive steps of the criminal proceedings. There are compelling reasons to believe that the LaGrands would have escaped the death penalty if this evidence had been introduced in time. Hence, the lack of consular advice was decisive for the infliction of the death penalty.

(4) By applying rules of its domestic law which prevented the LaGrands from raising the said violations of Art. 36 (1) of the Vienna Convention subsequent to their conviction in the courts of Arizona, in particular the rule of procedural default, and by not providing for any effective mechanism to remedy this situation in the post-conviction phase of the proceedings, the United States has committed a breach of its obligation to enable full effect to be given to the purposes for which the rights embodied in Art. 36 (1) are accorded (Art. 36 [2] of the Vienna Convention). A prerequisite of "prejudice" under domestic law is not in line with Art. 36 (2) of the Vienna Convention. But even if it were held otherwise, the law of the United States still does not meet the requirements of Art. 36 (2) of the Convention because it does not provide effective remedies even in the face of such prejudice, as in the case of the LaGrand brothers.

(5) By its failure to allow the LaGrands the exercise of the individual rights accruing to them as foreign nationals under Art. 36 (1) (b) of the Vienna Convention, the United States has also breached the minimum rights of aliens in foreign States under customary international law, entitling Germany to exercise its right of diplomatic protection.

(6) By not observing the Order on Provisional Measures pronounced by this Court on 3 March 1999, committing it "to take all measures at its disposal to ensure that Walter LaGrand is not executed pending the final decision" of the International Court of Justice on the matter, the United States has not abided by its obligation under Art. 94 of the Charter of the United Nations and Art. 41 of the Statute of the International Court of Justice to comply with the decision of the International Court of Justice in any case to which it is a party and its corresponding duty not to frustrate the judicial task of the Court.

(7) The United States did not prevent the execution of Karl and Walter LaGrand irrespective of German demands. By thus making irreversible its earlier breaches of Art. 5 and 36 (1) and (2) and causing irreparable harm, the United States violated its obligations under international law.

(8) The actions and omissions of the United States described in the preceding Conclusions (3) to (7) entail the international responsibility of the Respondent, according to the rules of general international law on the subject. The Vienna Convention on Consular Relations does not constitute a "self-contained régime" (to the exclusion of the generally applicable law of State responsibility). All the actions or omissions of the United States, including in particular those of United States courts, are attributable to the Respondent. Precepts and doctrines of the domestic law of the United States as applied by its authorities in the case of the LaGrands may not be invoked as justification for its failure to perform the obligations under the Vienna Convention. Further, independently of the view taken with regard to the subjective element in State responsibility, in the present case, negligence, at least, on the

part of the United States authorities is undeniable. Also, to the extent necessary within the present context, the local remedies available to the LaGrand brothers were all exhausted.

(9) By violating Art. 36 of the Vienna Convention on Consular Relations and by not observing the Provisional Measures indicated by this Court, the United States has injured Germany both in its own rights and in the rights of the LaGrands as its nationals. Germany is therefore entitled to invoke the international responsibility of the United States.

(10) As a consequence of the breaches described in Conclusions (3) to (7), it is incumbent on the United States to provide full reparation. However, through its non-observance of the binding Order of this Court, the United States has rendered the restoration of the *status quo ante* in the case of Walter LaGrand impossible. Germany concentrates its requests on – and limits the remedies it seeks from this Court to – what it considers absolutely necessary to ensure that German nationals in the United States will be provided with adequate consular assistance in the future. Thus, Germany limits its claims to reparation of the injury incurred by the treatment of the LaGrand brothers to

(a) satisfaction in the form of a pronouncement of the wrongfulness of the actions and omissions of the United States described above, and

(b) assurances and guarantees of non-repetition to prevent further violations of its rights and those of its nationals.

Neither of these remedies impairs the dignity of the United States. Neither Germany nor the LaGrands have contributed to the damage caused by the acts of the United States. The state of U.S. domestic law may not be invoked as a justification for the failure to provide the requested forms of reparation.

(11) As to the requested pronouncement of illegality of the conduct of the United States, Germany's claim fulfils all conditions under the law of

State responsibility: The conduct of the United States has inflicted moral damage upon Germany. A pronouncement of the wrongfulness of this conduct is necessary in order to restore and secure Germany's rights under the Consular Convention.

(12) Concerning the requested assurances and guarantees of non-repetition of the United States, they are appropriate because of the existence of a real risk of repetition and the seriousness of the injury suffered by Germany. Further, the choice of means by which full conformity of the future conduct of the United States with Art. 36 of the Vienna Convention is to be ensured, may be left to the United States.

II. Submissions

7.02 Having regard to the facts and points of law set forth in the present Memorial, and without prejudice to such elements of fact and law and to such evidence as may be submitted at a later time, and likewise without prejudice to the right to supplement and amend the present Submissions, the Federal Republic of Germany respectfully requests the Court to adjudge and declare

(1) that the United States, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36 subparagraph 1 (b) of the Vienna Convention on Consular Relations, and by depriving Germany of the possibility of rendering consular assistance, which ultimately resulted in the execution of Karl and Walter LaGrand, violated its international legal obligations to Germany, in its own right and in its right of diplomatic protection of its nationals, under Articles 5 and 36 paragraph 1 of the said Convention;

(2) that the United States, by applying rules of its domestic law, in particular the doctrine of procedural default, which barred Karl and Walter LaGrand from raising their claims under the Vienna Convention on Consular Relations, and by ultimately executing them, violated its

international legal obligation to Germany under Article 36 paragraph 2 of the Vienna Convention to give full effect to the purposes for which the rights accorded under Article 36 of the said Convention are intended;

(3) that the United States, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice on the matter, violated its international legal obligation to comply with the Order on Provisional Measures issued by the Court on 3 March 1999, and to refrain from any action which might interfere with the subject matter of a dispute while judicial proceedings are pending;

and, pursuant to the foregoing international legal obligations,

(4) that the United States shall provide Germany a guarantee that it will not repeat its illegal acts and ensure that, in any future cases of detention of or criminal proceedings against German nationals, United States domestic law and practice will not constitute a bar to the effective exercise of the rights under Article 36 of the Vienna Convention on Consular Relations.

16 September 1999

Bruno Simma

Co-Agent and Counsel

Gerhard Westdickenberg

Agent of the Government
of the Federal Republic of
Germany

LAGRAND CASE
(Germany v. United States of America)

MEMORIAL

OF THE

FEDERAL REPUBLIC OF GERMANY

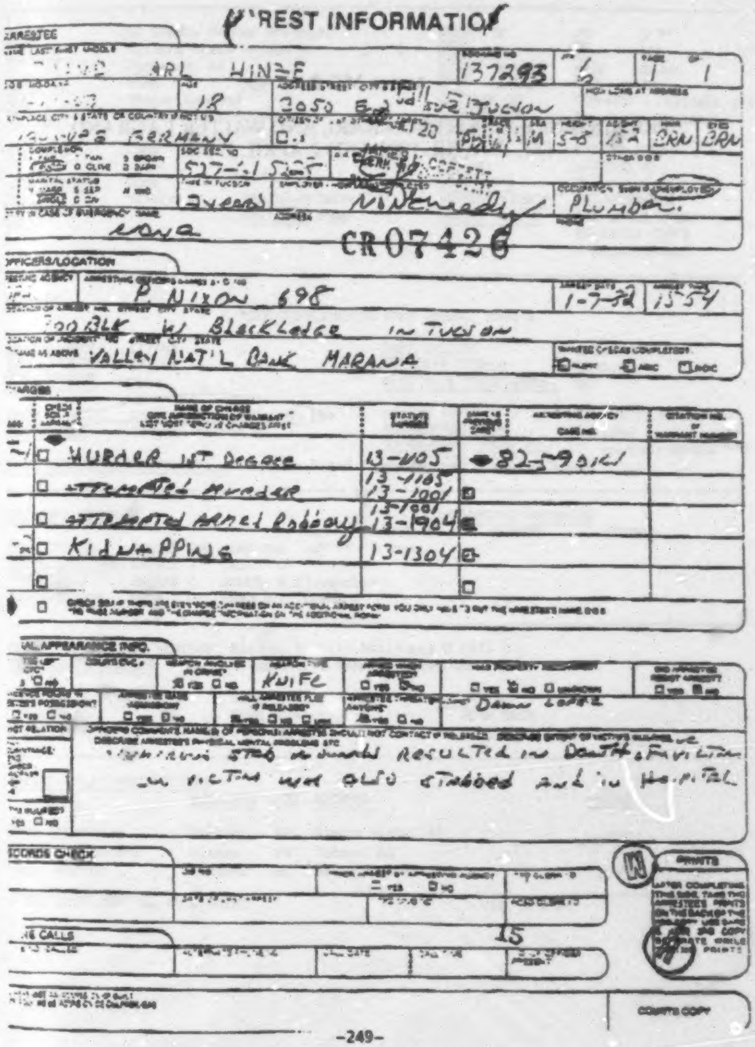
Volume II

(Annexes MG 1- 37)

16 September 1999

Annex MG 1

ARREST INFORMATION SHEET: KARL LAGRAND



'REST INFORMATIO

ARRESTEE

[illegible] ARL HINZE

137293

PAGE 1 OF 1

AGE 18

3050 E. 2nd [illegible] TUCSON

[illegible] GERMANY

M 5-8 152 BRN BRN

527-[illegible]

3 years

[illegible]

PLUMBER

CR07426

OFFICERS/LOCATION

P. NIXON 698

1-7-82 1554

700 BLK W Blacklidge in Tucson

VALLEY NAT'L BANK MARANA

CHARGES

☐	MURDER 1st Degree	13-1105		82-59[illegible]	
☐	ATTEMPTED MURDER	13-1105 13-1001	☐		
☐	ATTEMPTED ARMED ROBBERY	13-1001 13-1904	☐		
☐	KIDNAPPING	13-1304	☐		
☐			☐		

AL APPEARANCE INFO.

KNIFE

DAWN LOPEZ

[illegible] STAB wounds RESULTED in DEATH & FATILITY [illegible] victim was also stabbed and in hospital

ECORDS CHECK

15

NE CALLS

PRINTS

COURT'S COPY

Annex MG 2

PRESENTENCE REPORTS ON KARL AND WALTER LAGRAND (22, 23 APRIL 1982 AND 2 APRIL 1984)

NAME	LA GRAND, Walter Bernhart		
ADDRESS	Arizona State Prison Florence, AZ		
PHONE	None	MSG.	None
AKA	Walter LeGrand		
ID MARKS	Peacock left forearm		
EMPLOYER	None		
OCCUPATION	None		
MARITAL	Divorced	RELIGION	Catholic
EDUCATION	11	CHILDREN	None

RACE	W	HT	5'7"
SEX	M	WT	180
EYES	Brown	HAIR	Brown
DOB	1/26/62	AGE	22
CITIZEN OF	GERMANY - resident alie		
BIRTHPLACE	Augsburg, Germany		
DRIVER'S LIC.	Unknown		
SSN	527-57-3212		
FBI NO	127 538 W1		
BOOKING #	Unknown		
ARREST AGENCY	FBI/PCSD/DPS		
POLICE AGY #	91A-10482 (FBI) 82-59014 (DPS) Unknown (PCSD)		

OFFENSE

*SEE SUPPLEMENTAL FACE SHEET, PAGE 2

ARREST DATE	1/7/82	DATE/INDICT.	1/14/82
INCAR. DATE	1/7/82	REL.DATE/STATUS	Custody
JUV. REMAND	None	DAYS JAIL THIS ARREST	827
DEFENSE ATTY	Bruce Burke - APPT. No Fee	GUILTY BY/DATE	Jury 2/17/84
PROSECUTOR	Michael Alfred	SENTENCING DATE	4/13/84 **
		SENTENCING JUDGE XII	J. RICHARD HANNAH ***

CODEFENDANT/DISPOSITIONS: Karl La Grand - pending sentencing 4/13/84

CRIMINAL HISTORY

CONVICTIONS	FELONY 3	MISD Unk	JUV **
INCARCERATIONS	PRISON 3	JAIL 0	
**Numerous	ESCAPE 0	OTHER 3 (juvenile)	
SUPERVISIONS	PROB 0	PAROLE 1	OTHER 0

OUTSTANDING WARRANTS

CASE NO	CHARGE	STATE
None		

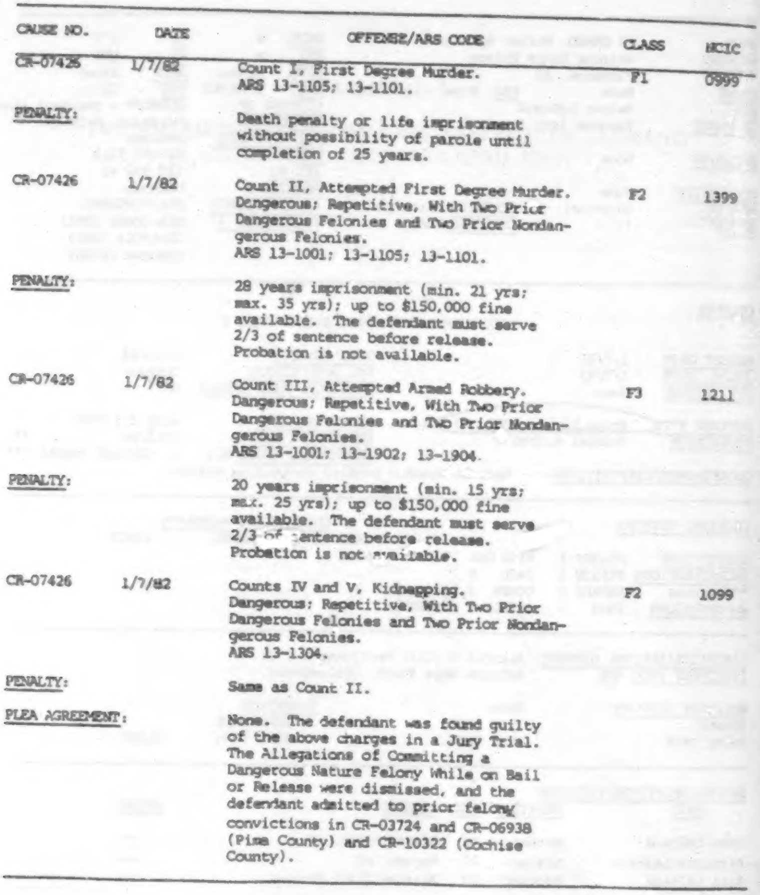
NARCOTICS/ALCOHOL HISTORY Alcohol U (01); Marijuana U (57)
TREATMENT PROGRAMS Arizona Boys Ranch; VisionQuest

MILITARY HISTORY	None	PROBATION	
BRANCH	TYPE DISC.	TERM DATE	
ENTRY DATE	DISC DATE.	TYPE TERM	CLASS

SPOUSE/RELATIVES/CHILDREN

NAME	RELATION	AGE	ADDRESS	PHONE
Emma LaGrand	Mother	41	Sierra Vista, AZ	---
Patricia LaGrand	Sister	23	Tucson, AZ	---
Karl LaGrand	Brother	20	Arizona State Prison	---

* SEE SUPPLEMENTAL FACE SHEET bjg 4/2/84



CAUSE NO.	DATE	OFFENSE/ARS CODE	CLASS	NCIC
CR-07426	1/7/82	Count I, First Degree Murder. ARS 13-1105; 13-1101.	F1	0999
PENALTY:		Death penalty or life imprisonment without possibility of parole until completion of 25 years.		
CR-07426	1/7/82	Count II, Attempted First Degree Murder. Dangerous; Repetitive, With Two Prior Dangerous Felonies and Two Prior Nondangerous Felonies. ARS 13-1001; 13-1105; 13-1101.	F2	1399
PENALTY:		28 years imprisonment (min. 21 yrs; max. 35 yrs); up to $150,000 fine available. The defendant must serve 2/3 of sentence before release. Probation is not available.		
CR-07426	1/7/82	Count III, Attempted Armed Robbery. Dangerous; Repetitive, With Two Prior Dangerous Felonies and Two Prior Nondangerous Felonies. ARS 13-1001; 13-1902; 13-1904.	F3	1211
PENALTY:		20 years imprisonment (min. 15 yrs; max. 25 yrs); up to $150,000 fine available. The defendant must serve 2/3 of sentence before release. Probation is not available.		
CR-07426	1/7/82	Counts IV and V, Kidnapping. Dangerous; Repetitive, With Two Prior Dangerous Felonies and Two Prior Nondangerous Felonies. ARS 13-1304.	F2	1099
PENALTY:		Same as Count II.		
PLEA AGREEMENT:		None. The defendant was found guilty of the above charges in a Jury Trial. The Allegations of Committing a Dangerous Nature Felony While on Bail or Release were dismissed, and the defendant admitted to prior felony convictions in CR-03724 and CR-06938 (Pima County) and CR-10322 (Cochise County).		

PRESENTENCE REPORT - PART ONE

GENERAL STATEMENT: This report supplements and updates the appended Presentence Report dated October 20, 1980, in cause number 10322 (Cochise County) for the offense of Third Degree Burglary; December 4, 1980, in CR-03724 (Pima County) for the offense of Attempted Aggravated Robbery; and, April 23, 1982, in CR-06938 (Pima County) for the offense of Armed Robbery and Kidnapping.

On December 10, 1980, the defendant was sentenced to two years with the Arizona Department of Corrections and was given credit for 63 days in custody in CR-03724 (Pima County). On December 15, 1980, he was sentenced to two years with the Arizona Department of Corrections and was given credit for 63 days, in CR-10322 (Cochise County), with the sentence to run concurrently with CR-03724. On April 30, 1982, the defendant was sentenced to 10.5 years on both the Armed Robbery and Kidnapping charges, with the sentences to run consecutively and to be given credit for 195 days.

The defendant was returned to the Arizona Department of Corrections immediately following his trial in this case; therefore, he has not been interviewed. A letter requesting a statement has been sent to him; however, it is unknown whether or not he will choose to respond. Should the defendant submit a statement prior to sentencing, it will be forwarded to the Court.

STATEMENT OF OFFENSE:

Offense: On January 7, 1982, at approximately 7 a.m., defendants Karl and Walter LaGrand arrived in Marana, Arizona, and intended to rob the Valley National Bank branch located in that city. They brought with them a briefcase containing electrical tape, several bandanas, and a steak knife. Also in their possession was a police radio scanner and a toy gun. The defendants drove past the bank several times waiting for the 63-year-old bank manager (victim number one) to arrive. When they observed his vehicle, they pulled into the parking lot and waited until he came outside to raise the flags. Karl LaGrand then approached him, showed him the toy gun which he had in the front of his pants, and forced him into the bank. Walter LaGrand remained in the car.

At approximately 8 a.m., only a few minutes after Karl forced victim number one inside the bank, the 20-year-old female bank employee (victim number two) arrived for work. As she walked through the door, Walter got out of the vehicle and asked her what time the bank opened. She told him 10 a.m. and went inside. Victim number two then observed Karl and victim number one standing next to the vault, attempting to open it. Karl ordered her to sit down, at which time, Walter entered the bank.

The defendants attempted to force the victims to open the safe, however were told by the victims that they only knew half of the combination and would have to wait for another bank employee (who knew the remainder of the combination) to arrive before it could be opened. The defendants then bound the victims' hands with electrical tape, gagged them with bandanas, and made them sit back-to-back in victim number one's office. Walter frequently made statements about killing the victims if they could not open the vault, comments which were reportedly also made by Karl at various times during the attempted robbery. At one time, Walter held victim number one's letter opener (or steak knife) to his throat and told him that if he was not telling the truth about the combination, he would kill him.

A third bank employee, a female, arrived at work but did not enter the bank, as she became concerned after observing the defendant's vehicle and noticing that it fit the description of a "suspicious vehicle" seen around the bank several days before. Because of her suspicions, she phoned the bank several times, speaking with victim number two. On one occasion, she told victim number two that she had left her lights on and that if she did not go out to turn them off, she would call police. As a result, the defendants allowed victim number two to go outside and turn her lights off, however threatened that if she did not return, they would kill victim number one. Despite victim number two turning off her car lights, the third bank employee was still concerned and did not return to the bank. She contacted the Marana Marshall's Office several times to voice her concern; however, they did not respond to the bank.

The defendants became increasingly anxious as time went on and continually made threats toward the victims if they did not open the safe. A struggle then ensued between the defendants and victim number one, during which, they repeatedly stabbed him and cut his throat. Hearing the commotion behind her, victim number two turned to see what was happening and attempted to help victim number one. She broke the tape which bound her hands; however, as she went to victim number one's aid, she was attacked by Walter LaGrand, who stabbed her five to seven times in the head, side, and shoulder. The defendants left her for dead and continued to stab victim number one before finally fleeing. They threw the briefcase containing victim number one's letter opener, the electrical tape, a bandana, victim number two's keys, and Karl's bloodstained jacket, in a desert area as they drove back to Tucson, Arizona. They also discarded their bloodstained clothing somewhere along the way.

On the afternoon of January 7, 1984, after tracing the license plate of the vehicle used in the robbery, FBI agents, along with Department of Public Safety officers and Pima County sheriff's deputies, went to an apartment complex located in the 3000 block of North Second Avenue, where the defendants resided with their girl friends. Agents observed the defendants and one of the girls drive away in the vehicle and stopped them a short distance from the apartment complex. Karl became extremely emotional when told that the officers were investigating an attempted bank robbery in which the bank manager was killed and a teller seriously injured. He began yelling, "No, not murder, not murder!;" however, he denied any knowledge of the incident when questioned further. Walter refused to answer any questions without an attorney present, however did deny being in Marana that morning. The defendants were then placed under arrest.

Additional Information: The 63-year-old victim (victim number one) suffered 24 "sharp force wounds," which included a deep cut to his throat and another cut on his chin which were made by the steak knife. The remaining wounds were "puncture wounds," made either by the steak knife or the letter opener, and possibly by both. Six or seven of the wounds could have caused the death of victim number one, with several others being serious enough to have caused death had they not received immediate medical attention.

Victim number two received numerous stab wounds (approximately five to seven) in the head, side, and shoulder. She suffered a collapsed left lung, and one of the wounds to her head was said to have just missed entering her brain, which could have caused very serious damage, if not death.

Defendant Karl LaGrand later confessed to a detective from the Pima County Sheriff's Department that he stabbed both victims after they began to panic. He claimed that victim number two began to scream, and when he went toward her to quiet her down, victim number one thought he was going to hurt her and kicked him in the shins. Karl then panicked and began stabbing the 63-year-old bank manager numerous times with a letter opener. He also stabbed victim number two before fleeing from the bank. He denied that Walter was in the room at the time of the stabbings.

Defendant's Statement: A statement from the defendant has not been received.

Victim's Statement: Victim number one's widow was contacted through a close friend to see if she wished to make a statement. It appears that she does not wish to do so, as she is having a hard time dealing with the death of her husband. She left town during the trial and wished to be away at the time of the sentencing and was upset to hear that it was continued to later date. If any statement is received prior to sentencing, it will be forwarded to the Court.

Victim number two was interviewed and presented an account of what happened during the instant offense. She claimed that both defendants were present when victim number one was killed, with Karl LaGrand holding him from behind, and Walter LaGrand hitting him from the front. When she went to victim number one's aid, Walter LaGrand stabbed her numerous times. She could not tell who had the steak knife and who had the letter opener, however believes that both defendants were armed with one or the other. She also remembered that Walter was constantly stating something to the effect of "killing" or "wasting" the victims and leaving. She added that Karl also threatened to kill the victims several times throughout the attempted robbery. Finally, victim number two felt that the defendants deserve the death penalty for what they did to victim number one, and the suffering he and his family went through as a result of the instant offense.

PREVIOUS RECORD: The defendant's law enforcement contacts prior to April, 1982, are documented in the attached previous Presentence Reports, and the most significant contacts are summarized in the General Statement of this report. The defendant, and local, state, and national law enforcement agencies document the following additional contacts:

DATE/PLACE	OFFENSE	DISPOSITION
ADULT:		
1/7/82 Tucson, AZ	First Degree Murder; Attempted First Degree Murder; Attempted Armed Robbery; Kidnapping, Two Counts. FBI 91A-10482. FBI 91A-92835. DPS 82-59014. PCSD case number unknown. CR-07426. INSTANT OFFENSE.	Pending.

Other Legal Status or Detainers: The defendant is presently serving a 21-year sentence with the Arizona Department of Corrections in case CR-06938.

SOCIAL HISTORY: See the appended Presentence Reports for additional social history.

Update: At the time of the instant offense, the defendant had been released from jail for only two days (released on January 5, 1982, third-party to the Correctional Volunteer Center), and he and his brother were residing with their girl friends (sisters) in an apartment located in the 3000 block of North Second Avenue.

The defendant was incarcerated in the Pima County Jail from the time of his arrest in the instant offense (January 7, 1982) until his sentencing in CR-06938 (April 30, 1982), after which, he has resided at the Arizona State Prison in Florence, Arizona. Department of Corrections records indicate several "write-ups" during his period of incarceration at the state prison, the most serious being for assault, possession of a handcuff key, and possession of deadly weapons (nunchakus and a homemade knife located in a box just outside of the defendant's cell). There have been other disciplinary actions for less serious violations of not following orders and being present in locations other than were authorized.

COLLATERAL INFORMATION: None.

Supporting documents are appended to this report and are available for review at the sentencing Court.

DEFENDANT'S PLANS: Unknown.

DECLARATION OF NONDISCLOSED ITEMS: None.

EVALUATION:

Evaluative Summary: See the attached previous Presentence Report for additional evaluation.

The defendant's previous record and his involvement in the instant offense tend to indicate a propensity toward violence and an unwillingness to accept responsibility for his actions. He has not been deterred by past punishments which have been imposed. As a result, the defendant poses an extreme danger to society, and prognosis for his rehabilitation appears poor.

Aggravation and Mitigation: The Court may consider the following circumstances in aggravation: the infliction of serious physical injury to the victims (causing death to one); the use of a deadly weapon; the presence of an accomplice; the especially heinous, cruel, or depraved manner in which the offense was committed; the defendant committed the offense as consideration for the receipt, or in the expectation of the receipt of something of pecuniary value; the defendant's extensive prior record; the defendant was on release in CR-06938 at the time of the instant offense; the defendant is a dangerous and violent person; the defendant is a danger to society, and an aggravated sentence may serve to protect society and innocent people; and, past punishments have not proven a deterrent to the defendant.

The Court may consider the following circumstance in mitigation: the defendant's actions may have partially resulted from a poor home environment, lack of family stability, broken home, poverty, and/or a lack of education.

Assessments:

Restitution: Due to the substantial nature of the penalties which could be imposed in this case, it is unlikely that any Court-ordered assessment could be paid.

Fines and Fees: See above.

Rehabilitation Programs: If sentenced to life imprisonment, the defendant should be classified as the highest security risk, with careful consideration being made to his past performances at the time of his parole eligibility. In the past, the defendant has performed fairly well while institutionalized, only to return to his illegal and violent behavior upon his release. If ever released, he should receive maximum parole supervision, with his associations and activities closely monitored.

Respectfully Submitted,

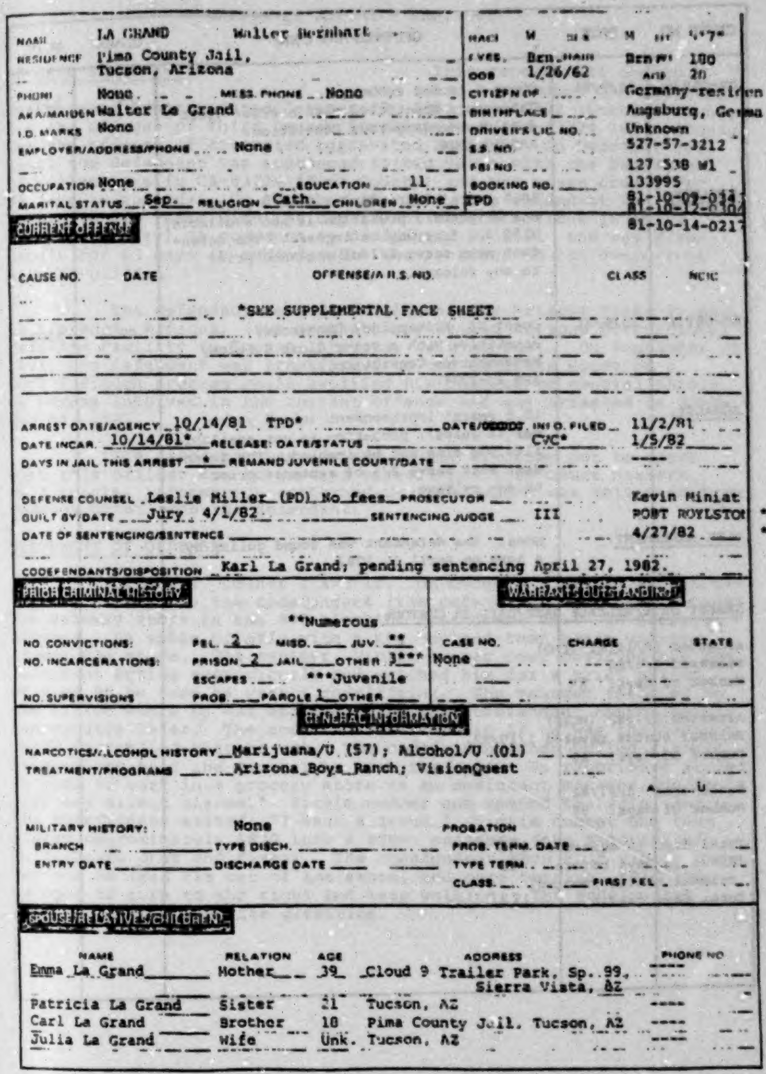
ROBERT E. LONG
Chief Probation Officer

Perry L. Montgomery
Perry L. Montgomery, Depu
Investigation Division

APPROVED:

Robert Onixon /WHR
William H. Ryerse, Supervisor
Investigation Division

April 2, 1984
bjg



NAME LA GRAND Walter Bernhart
RESIDENCE Pima County Jail,
Tucson, Arizona
PHONE None MESS. PHONE None
AKA/MAIDEN Walter Le Grand
I.D. MARKS None
EMPLOYER/ADDRESS/PHONE None
OCCUPATION None EDUCATION 11
MARITAL STATUS Sep. RELIGION Cath. CHILDREN None

RACE W SEX M HT 5'7"
EYES Brn HAIR Brn WT 100
DOB 1/26/62 AGE 20
CITIZEN OF Germany-residen
BIRTHPLACE Augsburg, Germa
DRIVER'S LIC. NO. Unknown
S.S. NO. 527-57-3212
FBI NO. 127 538 W1
BOOKING NO. 133995
TPD 81-10-09-014
81-10-12-030
81-10-14-0217

CURRENT OFFENSE

CAUSE NO. DATE OFFENSE/A.R.S. NO. CLASS NCIC

*SEE SUPPLEMENTAL FACE SHEET

ARREST DATE/AGENCY 10/14/81 TPD* DATE/[illegible] INFO. FILED 11/2/81
DATE INCAR. 10/14/81* RELEASE: DATE/STATUS CVC* 1/5/82
DAYS IN JAIL THIS ARREST * REMAND JUVENILE COURT/DATE ----

DEFENSE COUNSEL Leslie Miller (PD) No fees PROSECUTOR Kevin Miniat
GUILT BY/DATE Jury 4/1/82 SENTENCING JUDGE III POBT ROYLSTO *
DATE OF SENTENCING/SENTENCE 4/27/82 *

CODEFENDANTS/DISPOSITION Karl La Grand; pending sentencing April 27, 1982.

PRIOR CRIMINAL HISTORY

**Numerous

NO. CONVICTIONS: FEL. 2 MISD. JUV. **
NO. INCARCERATIONS: PRISON 2 JAIL OTHER 3***
ESCAPES ***Juvenile
NO. SUPERVISIONS PROB. PAROLE 1 OTHER

WARRANTS OUTSTANDING

CASE NO. CHARGE STATE
None

GENERAL INFORMATION

NARCOTICS/ALCOHOL HISTORY Marijuana/U (57); Alcohol/U (01)
TREATMENT/PROGRAMS Arizona Boys Ranch; VisionQuest
A U

MILITARY HISTORY: None
BRANCH TYPE DISCH.
ENTRY DATE DISCHARGE DATE

PROBATION
PROB. TERM. DATE
TYPE TERM.
CLASS. FIRST FEL.

SPOUSE/RELATIVES/CHILDREN

NAME	RELATION	AGE	ADDRESS	PHONE NO
Emma La Grand	Mother	39	Cloud 9 Trailer Park, Sp. 99, Sierra Vista, AZ	----
Patricia La Grand	Sister	21	Tucson, AZ	----
Carl La Grand	Brother	18	Pima County Jail, Tucson, AZ	----
Julia La Grand	Wife	Unk.	Tucson, AZ	----

CAUSE NO	DATE	OFFENSE/ARS CODE	CLASS	NCIC
CR-06938	10/9/81	Count I, Armed Robbery; Dangerous; Repetitive With a Prior Class 4 Felony Nondangerous Conviction. ARS 13-1904.	F2	1201
PENALTY:		10.5 years' imprisonment (min 7 years; max 21 years); probation is not available; $150,000 fine may be imposed. The defendant must serve 2/3 of sentence prior to any release.		
CR-06938	10/9/81	Count II, Kidnapping; Dangerous; Repetitive With a Prior Class 4 Felony Nondangerous Conviction. ARS 13-1304.	F2	1099
PENALTY:		10.5 years' imprisonment (min 7 years; max 21 years); probation is not available; $150,000 fine may be imposed. The defendant must serve 2/3 of sentence prior to any release.		
PLEA AGREEMENT:		None. The defendant was found guilty by a jury on April 1, 1982.		

ARREST DATE/RELEASE DATE/DAYS IN CUSTODY:

Arrested 10/14/81 (TPD)
Released 1/5/82
Number of days: 84

Arrested 1/7/82 (PCSD)
Release status revoked 1/19/82
Number of days: 13

Sentencing 4/27/82
Number of days: 98

Total days in custody: 195
(Minus 13 days before release status revoked) 13
Total days credit: 182

PRESENTENCE REPORT - PART ONE

GENERAL STATEMENT: This report will update and supplement the appended Presentence Reports dated October 20, 1980, in 10322 (Cochise County) for the offense of Third Degree Burglary; and, CR-03724 (Pima County) for the offense of Attempted Aggravated Robbery. On December 10, 1980, the defendant was sentenced to two years with the Department of Corrections in CR-03724 (Pima County) and was given credit for 63 days in custody. On December 15, 1980, the defendant was sentenced to two years with the Department of Corrections in 10322 (Cochise County) to commence as of January 3, 1981, and was given credit for 63 days in custody with the sentence to run concurrent with CR-03724.

The defendant served his time at the Arizona State Prison in Florence, Arizona, (two months), and at the Arizona Correctional Training Facility in Tucson, Arizona, (six months). On September 15, 1981, the defendant was transferred to the Congress House on a work fuflough program while awaiting his release on general parole. He became involved in the instant offense and was arrested on October 14, 1981.

The defendant was advised by his attorney not to speak with this officer due to pending appeals in other Court matters. As a result, information contained in this report was collected from sources other than the defendant.

STATEMENT OF OFFENSE:

Offense: Counts I and II. On October 9, 1981, at approximately 9:30 p.m., the codefendant (the defendant's brother) entered the Safeway store in the 800 block of East Grant Road in Tucson, Arizona. He spoke briefly with a bag boy and then began walking around the store. The manager, victim number one, observed the codefendant acting suspiciously and watched him for a brief period of time to be sure he wasn't shoplifting. The manager returned to the office where he was approached by the codefendant approximately ten minutes later. The codefendant asked him if he was the manager, which he replied that he was. The codefendant then pulled a small handgun and told the manager to open the safe. He reportedly stated, "I used to work in a grocery store as an assistant manager, so don't trip any silent alarms." Victim number one opened the safe, and the codefendant stated, "I want a grand." Victim number one then placed approximately $870 into a brown paperbag (the majority of bills being ones and fives). The codefendant then told victim number one to lead him out of the store, and once outside, told the manager to turn to the right and keep walking. The codefendant then ran in the opposite direction.

The defendant was waiting for the codefendant in a cab that was parked across the street (Park Avenue). The defendant reportedly ordered the cab and was picked up at approximately 9:15 p.m. in front of the Safeway store that the defendant robbed approximately 15 minutes later. The cab driver indicated that the defendant walked back and forth from the front of the store to the cab several times, waiting for his brother. While in front of the store, the defendant spoke with the bag boy (the same employee who also spoke with the defendant inside of the store).

Counts III through VI. These Counts involved an Armed Robbery committed by the defendant's brother (the codefendant) on October 12, 1981, at the Fry's Food Store located in the 200 block of West Fort Lowell Road in Tucson, Arizona. The defendant was not charged in these Counts; however, he was suspected of driving a white flatbed truck in which the codefendant fled in. This truck matched the description of a vehicle which the defendant drove at his construction job.

Count VII. On October 14, 1981, at approximately 6 p.m., Tucson Police Department officers were notified that an armed robber suspect was at the Safeway store located in the 1900 block of Broadway Boulevard in Tucson, Arizona. A store employee called police after observing the codefendant, who matched the description of the individual who had been robbing several grocery stores, enter the store with a wig and dark sunglasses on. When Tucson Police Department officers arrived, they observed the defendant behind the wheel of a vehicle with the codefendant as a passenger. Upon searching the vehicle, a brown wig was found under the passenger seat while a .25-caliber automatic pistol was found under the driver seat. The defendant and codefendant were arrested for Armed Robbery and Kidnapping while the defendant was additionally charged with Possession of a Deadly Weapon by a Prohibited Possessor.

Defendant's Statement: The defendant was advised by his attorney not to make a statement to this officer.

Victim's Statement: Contact with victim number one has proven unsuccessful at this time, as he is currently out of the state. The daytime manager at the store where victim number one is employed, reported some of the victim's feelings; however, they related mainly to the codefendant who actually confronted victim number one during the armed robbery. No additional statement or recommendation was made as to the defendant.

PREVIOUS RECORD: See the appended Presentence Report for the defendant's law enforcement contacts prior to November, 1980.

The defendant and local, state, and national law enforcement agencies document the following additional police contacts:

DATE-PLACE	OFFENSE	DISPOSITION
	ADULT:	
10/9/81 Tucson, AZ	Armed Robbery; Kidnapping. TPD 81-10-09-0343. CR-06938. INSTANT OFFENSE.	Pending.
1/7/82 Marana, AZ	First Degree Murder; Attempted First Degree Murder; Kidnapping, (two counts); Attempted Armed Robbery (two counts). CR-07426.	Trial pending.

Other Legal Status or Detainers: The defendant is pending trial in CR-07426 (January 7, 1982, offense listed above).

SOCIAL HISTORY: See the appended prior Presentence Reports for the defendant's social history prior to November of 1980.

The defendant was transferred from the Arizona Correctional Training Facility to Congress House in Tucson, Arizona, on September 15, 1981. He was released for program development to enable him to be released on general parole. The defendant found employment as a laborer with the Catalina Concrete Company and was to participate in the TASC Program for alcohol and mental health counseling.

The defendant was arrested for his involvement in the instant offense on October 14, 1981. He spent approximately two and one-half months in jail before being released on January 5, 1982. The defendant was arrested on January 7, 1982, after allegedly being involved in an attempted armed robbery of a bank where the bank manager was killed and a teller was seriously injured.

Marital History: According to the defendant's wife, she has not had any contact with the defendant since his release from prison, and does not wish to. She plans on eventually obtaining a divorce when she can afford to do so.

COLLATERAL INFORMATION Supporting documents are appended to this report and are available for review at the sentencing Court.

DEFENDANT'S PLANS: The defendant's future plans are unknown at this time.

DECLARATION OF NONDISCLOSED ITEMS: None.

EVALUATION:

Evaluative Summary: The defendant continues to become involved in illegal and antisocial behavior with his younger brother, and those offenses all appear to be of an increasingly serious and dangerous nature. Although the defendant usually appears to be the less involved of the two brothers during the illegal activity, he may be the catalyst or the instigator of the crimes. The defendant is the older of the two brothers and has in the past, been a major influence on his brother's behavior. When the two have no contact with each other or are in a highly structured environment (i.e. jail, prison, or treatment programs), they show signs of progress and rehabilitation. However, when the two get together, they appear to be a walking time bomb of criminality.

The defendant would appear to be a substantial risk for a community-based treatment program due to the seriousness of the offenses which the defendant becomes involved, as well as the fact that punishment for his criminal actiyity does not appear to be a deterrent to the defendant.

Aggravation and Mitigation: The Court may consider the following circumstances in aggravation: the offense involved the threatened infliction of serious physical injury; the use of a deadly weapon; the defendant, a convicted felon, was in possession of a prohibited firearm; the presence of an accomplice; the defendant committed the offenses in consideration for the receipt, or in the expectation of the receipt, of something of pecuniary value; the defendant's extensive prior record; the defendant may be a dangerous or violent person; the defendant is a danger to society; and, an aggravated sentence may serve to protect society and innocent people; the defendant was on work release status from the Department of Corrections at the time of the instant offense; and, a sentence should serve as a deterrent to others who are aware of the crime and contemporaries of the defendant.

The Court may also consider the following circumstances in mitigation: the defendant's age; the defendant's participation in the instant offense appears to have been of a lesser degree than the codefendant who actually committed the armed robberies; and the defendant's actions may have partially resulted from a poor home environment, lack of family stability, broken home, poverty, and a lack of education.

Assessments:

Restitution. Restitution would appear appropriate in this case, however, due to the fact that the defendant is facing a mandatory prison sentence of a substantial number of years, it appears highly unlikely that payment of such an assessment will be made.

Fines and Fees. It appears highly unlikely that any Court ordered assessment would be made due to the above-mentioned reason.

Rehabilitation Programs: While in prison, the defendant should take advantage of any educational, vocational, and counseling programs available to him. When released, he should receive maximum supervision and not be allowed to have any contact with his brother. His associations and activities should be closely monitored.

Respectfully submitted,

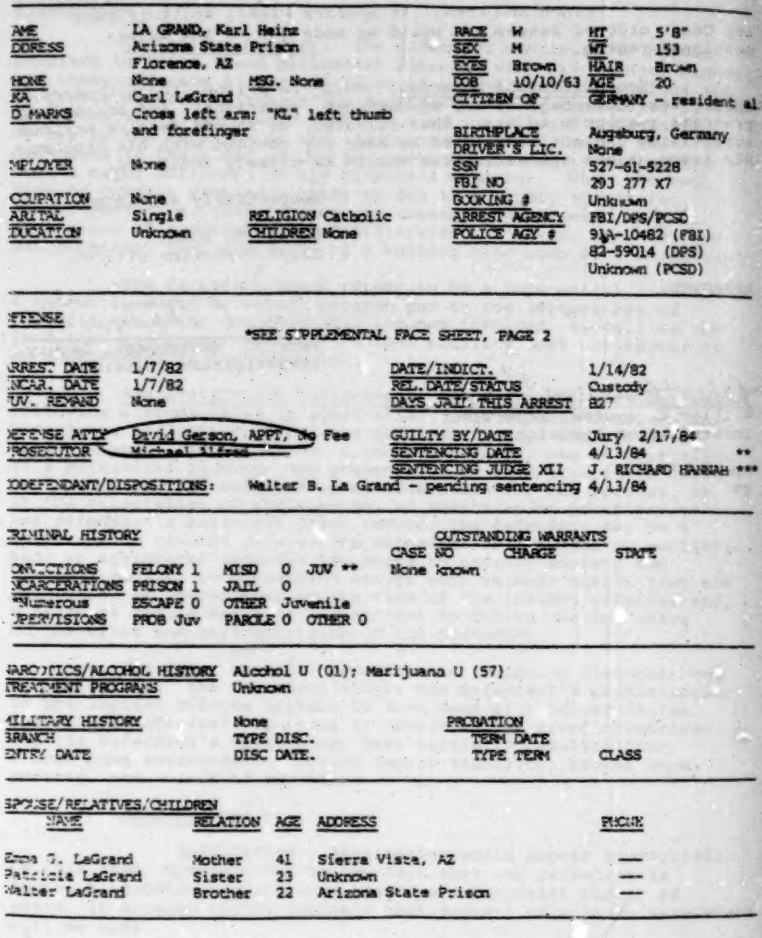
ROBERT E. LONG,
Chief Probation Officer

Perry L Montgomery
Perry L. Montgomery, Deputy
Investigation Division

APPROVED:

Robert Orrison
William H. Ryerse, Supervisor
Investigation Division

April 23, 1982
gm



AME	LA GRAND, Karl Heinz			RACE	W	HT	5'8"
DDRESS	Arizona State Prison Florence, AZ			SEX	M	WT	153
				EYES	Brown	HAIR	Brown
HONE	None	MSG.	None	DOB	10/10/63	AGE	20
KA	Carl LaGrand			CITIZEN OF		GERMANY - resident al	
D MARKS	Cross left arm: "KL" left thumb and forefinger						
				BIRTHPLACE		Augsburg, Germany	
				DRIVER'S LIC.		None	
MPLOYER	None			SSN		527-61-5228	
				FBI NO		293 277 X7	
CCUPATION	None			BOOKING #		Unknown	
ARITAL	Single	RELIGION	Catholic	ARREST AGENCY		FBI/DPS/PCSD	
DUCATION	Unknown	CHILDREN	None	POLICE AGY #		91A-10482 (FBI) 82-59014 (DPS) Unknown (PCSD)	

FFENSE

*SEE SUPPLEMENTAL FACE SHEET, PAGE 2

RREST DATE	1/7/82	DATE/INDICT.	1/14/82
NCAR. DATE	1/7/82	REL. DATE/STATUS	Custody
UV. REMAND	None	DAYS JAIL THIS ARREST	827
EFENSE ATTY	David Gerson, APPT, No Fee	GUILTY BY/DATE	Jury 2/17/84
ROSECUTOR	Michael Alfred	SENTENCING DATE	4/13/84 **
		SENTENCING JUDGE XII	J. RICHARD HANNAH ***

ODEFENDANT/DISPOSITIONS: Walter B. La Grand - pending sentencing 4/13/84

RIMINAL HISTORY

ONVICTIONS	FELONY 1	MISD	0	JUV **	
NCARCERATIONS	PRISON 1	JAIL	0		
**Numerous	ESCAPE 0	OTHER	Juvenile		
UPERVISIONS	PROB Juv	PAROLE 0	OTHER 0		

OUTSTANDING WARRANTS

CASE NO CHARGE STATE

None known

NARCOTICS/ALCOHOL HISTORY Alcohol U (01); Marijuana U (57)

TREATMENT PROGRAMS Unknown

ILITARY HISTORY None

RANCH TYPE DISC.

NTRY DATE DISC DATE.

PROBATION

TERM DATE

TYPE TERM CLASS

SPOUSE/RELATIVES/CHILDREN

NAME	RELATION	AGE	ADDRESS	PHONE
Emma G. LaGrand	Mother	41	Sierra Vista, AZ	—
Patricia LaGrand	Sister	23	Unknown	—
Walter LaGrand	Brother	22	Arizona State Prison	—

AUSE NO.	DATE	OFFENSE/ARS CODE	CLASS	NCIC
R-07426	1/7/82	Count I, First Degree Murder. ARS 13-1105; 13-1101.	F1	0999
ENALTY:		Death penalty or life imprisonment without possiblity of parole until completion of 25 years.		
R-07426	1/7/82	Count II, Attempted First Degree Murder. Dangerous; Repetitive, With Two Prior Dangerous Felonies. ARS 13-1001; 13-1105; 13-1101.	F2	1315
ENALTY:		28 years imprisonment (min. 21 yrs; max. 35 yrs); up to $150,000 fine available. The defendant must serve 2/3 of sentence before release. Probation is not available.		
R-07426	1/7/82	Count III, Attempted Armed Robbery. Dangerous; Repetitive, With Two Prior Dangerous Felonies. ARS 13-1001; 13-1902; 13-1904.	F3	1211
NALTY:		20 years imprisonment (min. 15 yrs; max. 25 yrs); up to $150,000 fine available. The defendant must serve 2/3 of sentence before release. Probation is not available.		
R-07426	1/7/82	Counts IV and V, Kidnapping. Dangerous; Repetitive, With Two Prior Dangerous Felonies. ARS 13-1304.	F2	1099
NALTY:		Same as Count II.		
EA AGREEMENT:		None. The defendant was found guilty by a Jury of the above charges on February 17, 1984. At that time, the Allegations of Committing a Dangerous Felony While on Bail or Other Release was dismissed. On March 15, 1984, the Allegation of Prior Conviction in CR-06938 was found to be true.		

[illegible]

PRESENTENCE REPORT - PART ONE

GENERAL STATEMENT:

This report supplements and updates the appended prior Presentence Report dated April 22, 1982, in CR-06936, for the offenses of Armed Robbery (Two Counts), Kidnapping (Three Counts), and Aggravated Assault. On April 27, 1982, the defendant was sentenced to 21 years with the Arizona Department of Corrections (two consecutive 10.5-year sentences, three concurrent 10.5-year sentences, and a concurrent 7.5-year sentence) and was given credit for 180 days.

The defendant was returned to the Arizona Department of Corrections immediately following his trial in the instant matter, and therefore, has not been interviewed. A letter requesting a statement has been sent to him at the Arizona State Prison in Florence, Arizona; however, it is unknown whether or not he will choose to respond. Should the defendant submit a statement prior to sentencing, it will be forwarded to the Court.

STATEMENT OF OFFENSE:

Offense: On January 7, 1982, at approximately 7 a.m., defendants Karl and Walter LaGrand arrived in Marana, Arizona, and intended to rob the Valley National Bank branch located in that city. They brought with them a briefcase containing electrical tape, several bandanas, and a steak knife. Also in their possession was a police radio scanner and a toy gun. The defendants drove past the bank several times waiting for the 63-year-old bank manager (victim number one) to arrive. When they observed his vehicle, they pulled into the parking lot and waited until he came outside to raise the flags. Karl LaGrand then approached him, showed him the toy gun which he had in the front of his pants, and forced him into the bank. Walter LaGrand remained in the car.

At approximately 8 a.m., only a few minutes after Karl forced victim number one inside the bank, the 20-year-old female bank employee (victim number two) arrived for work. As she walked through the door, Walter got out of the vehicle and asked her what time the bank opened. She told him 10 a.m. and went inside. Victim number two then observed Karl and victim number one standing next to the vault, attempting to open it. Karl ordered her to sit down, at which time, Walter entered the bank.

The defendants attempted to force the victims to open the safe, however were told by the victims that they only knew half of the combination and would have to wait for another bank employee (who knew the remainder of the combination) to arrive before it could be opened. The defendants then bound the victims' hands with electrical tape, gagged them with bandanas, and made them sit back-to-back in victim number one's office. Walter frequently made statements about killing the victims if they could not open the vault.

comments which were reportedly also made by Karl at various times during the attempted robbery. At one time, Walter held victim number one's letter opener (or steak knife) to his throat and told him that if he was not telling the truth about the combination, he would kill him.

A third bank employee, a female, arrived at work but did not enter the bank, as she became concerned after observing the defendant's vehicle and noticing that it fit the description of a "suspicious vehicle" seen around the bank several days before. Because of her suspicions, she phoned the bank several times, speaking with victim number two. On one occasion, she told victim number two that she had left her lights on and that if she did not go out to turn them off, she would call police. As a result, the defendants allowed victim number two to go outside and turn her lights off, however threatened that if she did not return, they would kill victim number one. Despite victim number two turning off her car lights, the third bank employee was still concerned and did not return to the bank. She contacted the Marana Marshall's Office several times to voice her concern; however, they did not respond to the bank.

The defendants became increasingly anxious as time went on and continually made threats toward the victims if they did not open the safe. A struggle then ensued between the defendants and victim number one, during which, they repeatedly stabbed him and cut his throat. Hearing the commotion behind her, victim number two turned to see what was happening and attempted to help victim number one. She broke the tape which bound her hands; however, as she went to victim number one's aid, she was attacked by Walter LaGrand, who stabbed her five to seven times in the head, side, and shoulder. The defendants left her for dead and continued to stab victim number one before finally fleeing. They threw the briefcase containing victim number one's letter opener, the electrical tape, a bandana, victim number two's keys, and Karl's bloodstained jacket, in a desert area as they drove back to Tucson, Arizona. They also discarded their bloodstained clothing somewhere along the way.

On the afternoon of January 7, 1984, after tracing the license plate of the vehicle used in the robbery, FBI agents, along with Department of Public Safety officers and Pima County sheriff's deputies, went to an apartment complex located in the 3000 block of North Second Avenue, where the defendants resided with their girl friends. Agents observed the defendants and one of the girls drive away in the vehicle and stopped them a short distance from the apartment complex. Karl became extremely emotional when told that the officers were investigating an attempted bank robbery in which the bank manager was killed and a teller seriously injured. He began yelling, "No, not murder, not murder!;" however, he denied any knowledge of the incident when questioned further. Walter refused to answer any questions without an attorney present, however did deny being in Marana that morning. The defendants were then placed under arrest.

Additional Information: The 63-year-old victim (victim number one) suffered 24 "sharp force wounds," which included a deep cut to his throat and another cut on his chin which were made by the steak knife. The remaining wounds were "puncture wounds," made either by the steak knife or the letter opener, and possibly by both. Six or seven of the wounds could have caused the death of victim number one, with several others being serious enough to have caused death had they not received immediate medical attention.

Victim number two received numerous stab wounds (approximately five to seven) in the head, side, and shoulder. She suffered a collapsed left lung, and one of the wounds to her head was said to have just missed entering her brain, which could have caused very serious damage, if not death.

Defendant Karl LaGrand later confessed to a detective from the Pima County Sheriff's Department that he stabbed both victims after they began to panic. He claimed that victim number two began to scream, and when he went toward her to quiet her down, victim number one thought he was going to hurt her and kicked him in the shins. Karl then panicked and began stabbing the 63-year-old bank manager numerous times with a letter opener. He also stabbed victim number two before fleeing from the bank. He denied that Walter was in the room at the time of the stabbings.

Defendant's Statement: A statement from the defendant has not been received.

Victim's Statement: Victim number one's widow was contacted through a close friend to see if she wished to make a statement. It appears that she does not wish to do so, as she is having a hard time dealing with the death of her husband. She left town during the trial and wished to be away at the time of the sentencing and was upset to hear that it was continued to a later date. If any statement is received prior to sentencing, it will be forwarded to the Court.

Victim number two was interviewed and presented an account of what happened during the instant offense. She claimed that both defendants were present when victim number one was killed, with Karl LaGrand holding him from behind, and Walter LaGrand hitting him from the front. When she went to victim number one's aid, Walter LaGrand stabbed her numerous times. She could not tell who had the steak knife and who had the letter opener, however believes that both defendants were armed with one or the other. She also remembered that Walter was constantly stating something to the effect of "killing" or "wasting" the victims and leaving. She added that Karl also threatened to kill the victims several times throughout the attempted robbery. Finally, victim number two felt that the defendants deserve the death penalty for what they did to victim number one, and the suffering he and his family went through as a result of the instant offense.

PREVIOUS RECORD: The defendant's law enforcement contacts prior to April, 1982, are documented in the attached previous Presentence Reports, and the most significant contacts are summarized in the General Statement of this report. The defendant, and local, state, and national law enforcement agencies document the following additional contacts:

DATE/PLACE	OFFENSE	DISPOSITION
ADULT:		
1/7/82 Tucson, AZ	First Degree Murder; Attempted First Degree Murder; Attempted Armed Robbery; Kidnapping, Two Counts. FBI 91A-10482. FBI 91A-92835. DPS 82-59014. PCSD case number unknown. CR-07426. INSTANT OFFENSE.	Pending.

Other Legal Status or Detainers: The defendant is presently serving a 21-year sentence with the Arizona Department of Corrections in case CR-06938.

SOCIAL HISTORY: See the appended prior Presentence Report for additional social history.

Update: At the time of the instant offense, the defendant and his brother were residing with their girl friends (sisters) in an apartment located in the 3000 block of North Second Avenue. The defendant had been out of custody in case CR-06938 for approximately two weeks and was unemployed. From the time of his arrest on January 7, 1982, until his sentencing in CR-06938 on April 27, 1982, the defendant was in the Pima County Jail. Since that time, the defendant has been serving a 21-year prison sentence in the Arizona State Prison in Florence, Arizona. During this time, the defendant has had several "write-ups," with the most serious infractions for being possession of a handcuff key and assault, with less serious violations being for not following orders of corrections officials and being in areas where not authorized. Additional information is unknown at this time.

COLLATERAL INFORMATION: None.

Supporting documents are appended to this report and are available for review at the sentencing Court.

DEFENDANT'S PLANS: Unknown.

DECLARATION OF NONDISCLOSED ITEMS: None.

EVALUATION:

Evaluative Summary: See the appended prior report for additional evaluation.

The defendant has exhibited a history of violence, both as a juvenile, as well as an adult, and has not taken responsibility for his behavior or learned from past punishments which have been imposed. As a result, prognosis for his rehabilitation is poor, and he therefore poses a substantial risk to society.

Aggravation and Mitigation: The Court may consider the following circumstances in aggravation: the infliction of serious physical injury to the victims (causing death to one); the use of a deadly weapon; the presence of an accomplice; the especially heinous, cruel, or depraved manner in which the offense was committed; the defendant committed the offense as consideration for the receipt, or in the expectation of the receipt of something of pecuniary value; the defendant's extensive prior record; the defendant was on release in CR-06938 at the time of the instant offense; the defendant is a dangerous and violent person; the defendant is a danger to society, and an aggravated sentence may serve to protect society and innocent people; and, past punishments have not proven a deterrent to the defendant.

The Court may consider the following circumstance in mitigation: the defendant's actions may have partially resulted from a poor home environment, lack of family stability, broken home, poverty, and/or a lack of education.

Assessments:

Restitution: Due to the substantial nature of the penalties which could be imposed in this case, it is unlikely that any Court-ordered assessment could be paid.

Fines and Fees: See above.

Rehabilitation Programs: If sentenced to life imprisonment, the defendant should be classified as the highest security risk, with careful consideration being made to his past performances at the time of his parole eligibility. In the past, the defendant has performed fairly well while institutionalized, only to return to his illegal and violent behavior upon his release. If ever released, he should receive maximum parole supervision, with his associations and activities closely monitored.

Respectfully Submitted,

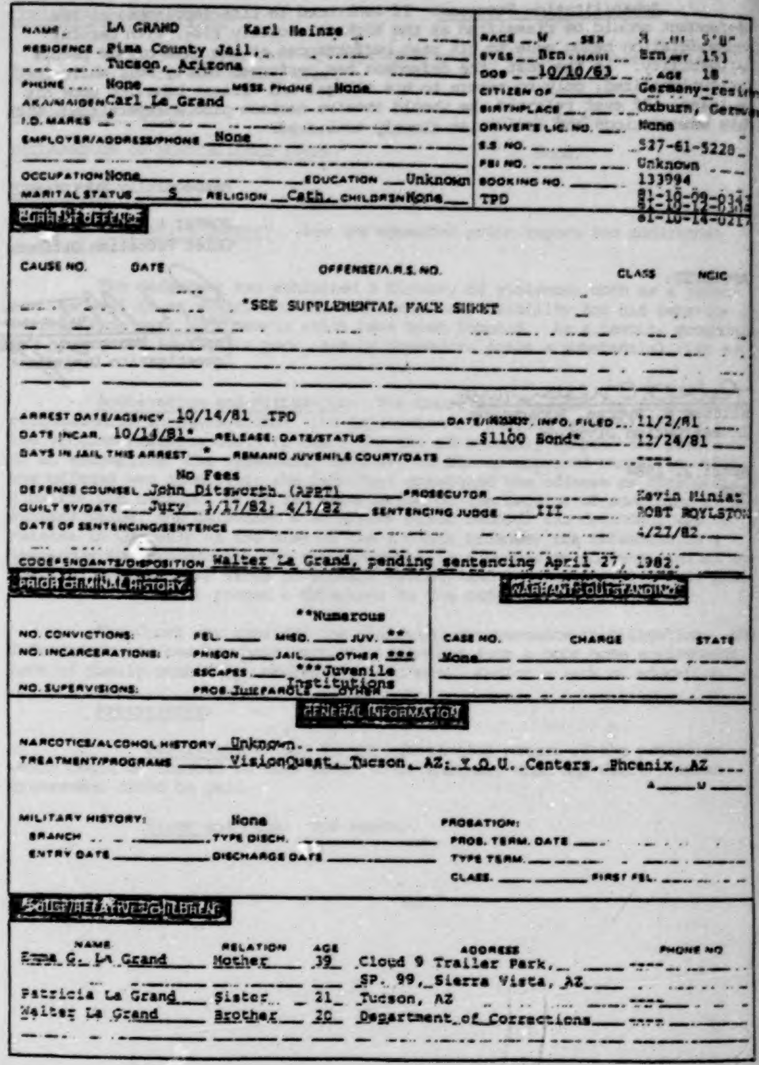
ROBERT E. LONG
Chief Probation Officer

APPROVED:

Perry L Montgomery
Perry L. Montgomery, Deput
Investigation Division

Robert Onitson/WHR
William H. Ryerse, Supervisor
Investigation Division

April 2, 1984
bjg



NAME LA GRAND Karl Heinze
RESIDENCE Pima County Jail,
Tucson, Arizona
PHONE None MESS. PHONE None
AKA/MAIDEN Carl Le Grand
I.D. MARKS *
EMPLOYER/ADDRESS/PHONE None
OCCUPATION None EDUCATION Unknown
MARITAL STATUS S RELIGION Cath. CHILDREN None

RACE W SEX M HT 5'8"
EYES Brn. HAIR Brn WT 151
DOB 10/10/63 AGE 18
CITIZEN OF Germany-resi
BIRTHPLACE Oxburn, Germany
DRIVER'S LIC. NO. None
S.S. NO. 527-61-5228
FBI NO. Unknown
BOOKING NO. 133994
TPD 81-10-09-03
81-10-12-03
81-10-14-021

CURRENT OFFENSE

CAUSE NO.	DATE	OFFENSE/A.R.S. NO.	CLASS	NCIC
		*SEE SUPPLEMENTAL FACE SHEET		

ARREST DATE/AGENCY 10/14/81 TPD DATE/INDICT. INFO. FILED 11/2/81
DATE INCAR. 10/14/81* RELEASE: DATE/STATUS $1100 Bond* 12/24/81
DAYS IN JAIL THIS ARREST * REMAND JUVENILE COURT/DATE
No Fees
DEFENSE COUNSEL John Ditsworth (APPT) PROSECUTOR Kevin Miniat
GUILT BY/DATE Jury 3/17/82; 4/1/82 SENTENCING JUDGE III ROBT ROYLSTON
DATE OF SENTENCING/SENTENCE 4/27/82
CODEFENDANTS/DISPOSITION Walter La Grand, pending sentencing April 27, 1982.

PRIOR CRIMINAL HISTORY

**Numerous
NO. CONVICTIONS: FEL. MISD. JUV. **
NO. INCARCERATIONS: PRISON JAIL OTHER ***
ESCAPES ***Juvenile Institutions
NO. SUPERVISIONS: PROB. Juv PAROLE OTHER

WARRANTS OUTSTANDING

CASE NO.	CHARGE	STATE
None		

GENERAL INFORMATION

NARCOTICS/ALCOHOL HISTORY Unknown.
TREATMENT/PROGRAMS VisionQuest, Tucson, AZ; Y.O.U. Centers, Phoenix, AZ
A U

MILITARY HISTORY: None
BRANCH TYPE DISCH.
ENTRY DATE DISCHARGE DATE

PROBATION:
PROB. TERM. DATE
TYPE TERM.
CLASS. FIRST FEL.

SPOUSE/RELATIVES/CHILDREN

NAME	RELATION	AGE	ADDRESS	PHONE NO
Emma G. La Grand	Mother	39	Cloud 9 Trailer Park, SP. 99, Sierra Vista, AZ	
Patricia La Grand	Sister	21	Tucson, AZ	
Walter La Grand	Brother	20	Department of Corrections	

CAUSE NO	DATE	OFFENSE/ARS CODE	CLASS	NCIC
CR-06938	10/9/81	Count I, Armed Robbery; Dangerous; Nonrepetitive. ARS 13-1904.	F2	1201
PENALTY:		10.5 years' imprisonment (min 7 years; max 21 years); probation is not available; $150,000 fine may be imposed. The defendant must serve 2/3 of sentence before any type of release.		
CR-06938	10/9/81	Count II, Kidnapping; Dangerous; Nonrepetitive. ARS 13-1304.	F2	1099
PENALTY:		10.5 years' imprisonment (min 7 years; max 21 years); probation is not available; $150,000 fine may be imposed. The defendant must serve 2/3 of sentence before any type of release.		
CR-06938	10/12/81	Count III, Armed Robbery; Dangerous; Nonrepetitive. ARS 13-1904.	F2	1201
PENALTY:		10.5 years' imprisonment (min 7 years; max 21 years); probation is not available; $150,000 fine may be imposed. The defendant must serve 2/3 of sentence before any type of release.		
CR-06938	10/12/81	Count IV, Kidnapping; Dangerous; Nonrepetitive. ARS 13-1304.	F2	1099
PENALTY:		10.5 years' imprisonment (min 7 years; max 21 years); probation is not available; $150,000 fine may be imposed. The defendant must serve 2/3 of sentence before any type of release.		

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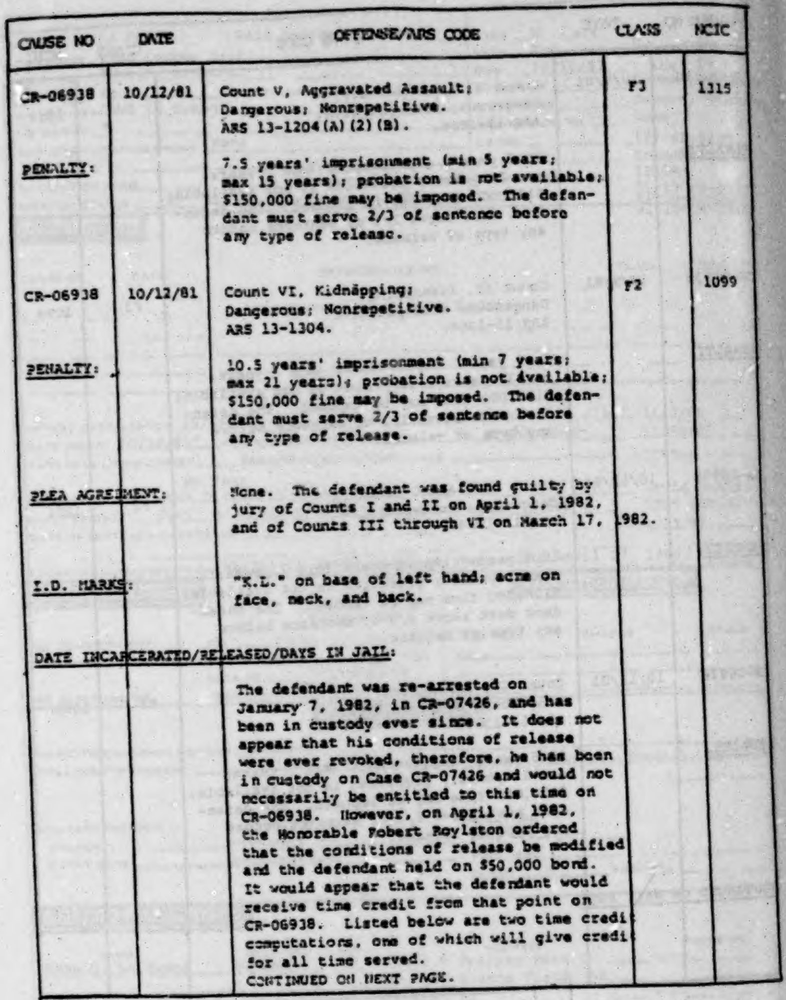
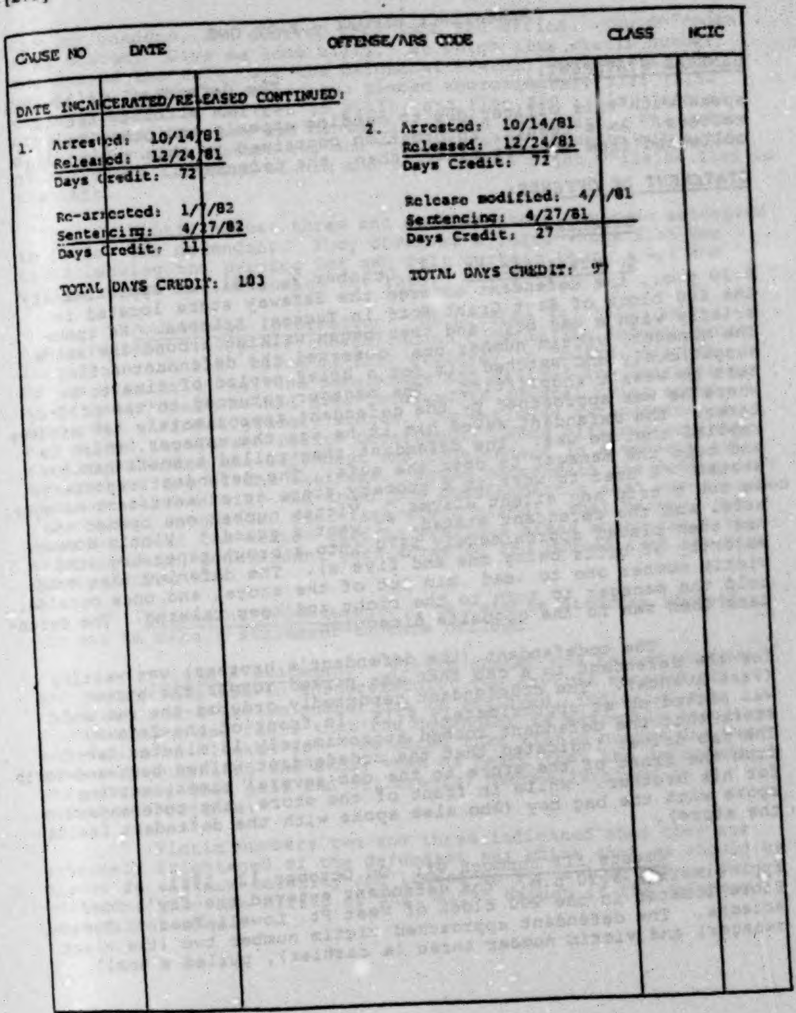


CAUSE NO	DATE	OFFENSE/ARS CODE	CLASS	NCIC
CR-06938	10/12/81	Count V, Aggravated Assault; Dangerous; Nonrepetitive. ARS 13-1204(A)(2)(B).	F3	1315
PENALTY:		7.5 years' imprisonment (min 5 years; max 15 years); probation is not available; $150,000 fine may be imposed. The defendant must serve 2/3 of sentence before any type of release.		
CR-06938	10/12/81	Count VI, Kidnapping; Dangerous; Nonrepetitive. ARS 13-1304.	F2	1099
PENALTY:		10.5 years' imprisonment (min 7 years; max 21 years); probation is not available; $150,000 fine may be imposed. The defendant must serve 2/3 of sentence before any type of release.		
PLEA AGREEMENT:		None. The defendant was found guilty by jury of Counts I and II on April 1, 1982, and of Counts III through VI on March 17, 1982.		
I.D. MARKS:		"K.L." on base of left hand; acne on face, neck, and back.		
DATE INCARCERATED/RELEASED/DAYS IN JAIL:				
		The defendant was re-arrested on January 7, 1982, in CR-07426, and has been in custody ever since. It does not appear that his conditions of release were ever revoked, therefore, he has been in custody on Case CR-07426 and would not necessarily be entitled to this time on CR-06938. However, on April 1, 1982, the Honorable Robert Roylston ordered that the conditions of release be modified and the defendant held on $50,000 bond. It would appear that the defendant would receive time credit from that point on CR-06938. Listed below are two time credi computations, one of which will give credi for all time served. CONTINUED ON NEXT PAGE.		



CAUSE NO	DATE	OFFENSE/ARS CODE	CLASS	NCIC

DATE INCARCERATED/RELEASED CONTINUED:

1. Arrested: 10/14/81
Released: 12/24/81
Days Credit: 72

Re-arrested: 1/7/82
Sentencing: 4/27/82
Days Credit: 11

TOTAL DAYS CREDIT: 103

2. Arrested: 10/14/81
Released: 12/24/81
Days Credit: 72

Release modified: 4/ /81
Sentencing: 4/27/81
Days Credit: 27

TOTAL DAYS CREDIT: 9

PRESENTENCE REPORT - PART ONE

GENERAL STATEMENT: The defendant was advised by his attorney not to speak with this officer due to pending appeals and other Court matters. As a result, information contained in this report was collected from sources other than the defendant.

STATEMENT OF OFFENSE:

Offense:

Counts I and II - On October 9, 1981, at approximately 9:30 p.m., the defendant entered the Safeway store located in the 800 block of East Grant Road in Tucson, Arizona. He spoke briefly with a bag boy, and then began walking around the store. The manager, victim number one, observed the defendant acting suspiciously and watched him for a brief period of time to be sure he wasn't shoplifting. The manager returned to the officer, where he was approached by the defendant approximately ten minutes later. The defendant asked him if he was the manager, which he replied that he was. The defendant then pulled a small handgun and told the manager to open the safe. The defendant reportedly stated, "I used to work in a grocery store as an assistant manager, so don't trip any silent alarms." Victim number one opened the safe, and the defendant stated, "I want a grand." Victim number one then placed approximately $870 into a brown paper bag (the majority of bills being one and five's). The defendant then told victim number one to lead him out of the store, and once outside, told the manager to turn to the right and keep walking. The defendant then ran in the opposite direction.

The codefendant (the defendant's brother) was waiting for the defendant in a cab that was parked across the street (Park Avenue). The codefendant reportedly ordered the cab and was picked up at approximately 9:15, in front of the Safeway store that the defendant robbed approximately 15 minutes later. The cab driver indicated that the codefendant walked back-and-forth from the front of the store to the cab several times, waiting for his brother. While in front of the store, the codefendant spoke with the bag boy (who also spoke with the defendant inside the store).

Counts III through VI: On October 12, 1981, at approximately 8:30 p.m., the defendant entered the Fry's Food Store located in the 200 block of West Ft. Lowell Road in Tucson, Arizona. The defendant approached victim number two (the night manager) and victim number three (a cashier), pulled a small caliber handgun, and ordered them into the office. The defendant then stated, "Give me some bills," at which time victim number two opened the safe, and the defendant stated, "Now get all of the bills." Victim number two placed approximately $325 ($150 one dollar bills, fifteen $5 bills, and five $20 bills) into a green canvas bank bag and handed it to the defendant. The defendant told victim number two and victim number three to walk outside of the store in front of him and turn to the right while he fled to the left.

Victim number three and another store employee attempted to follow the defendant. They observed a large white flat bed truck leaving the parking lot and felt certain that it was the vehicle which the defendant got into.

Additional Information: On October 14, 1981, at approximately 5:30 p.m., the defendant entered the Safeway store located in the 1900 block of East Broadway in Tucson, Arizona. He was wearing a wig, and sunglasses and matched the description of an individual who had been involved in several prior armed robberies at local grocery stores. An employee got suspicious and called the Tucson Police Department. When officers arrived, they apprehended the defendant and codefendant in a vehicle in the parking lot of the business. Found underneath the defendant's seat was a brown wig, and under the codefendant's seat was a loaded .25 caliber automatic, stainless steel pistol, that matched the description of the weapon used in previous armed robberies. The defendant and codefendant were arrested and booked into the Pima County Jail.

Defendant's Statement: The defense attorney advised him not to make a statement to this officer.

Victim's Statement: Victim number one is out of town and contact has proven unsuccessful. The daytime manager of the store where victim number one is employed, indicated that victim number one feels that the defendant is extremely dangerous and should be "locked up." He added that victim number one was extremely surprised and angry when he heard that the defendant was released from jail and (allegedly) became involved in a subsequent offense.

Victim numbers two and three indicated that they are extremely frightened of the defendant and think that he should be placed in maximum security and locked up for a long time. In addition, they are afraid of what might happen if the defendant is ever released.

PREVIOUS RECORD: The defendant and local, state, and national law enforcement agencies document the following police contacts:

JUVENILE: In addition to the following offenses, the defendant has run away from home (and was referred to Juvenile Court) on numerous occasions.

DATE-PLACE	OFFENSE	DISPOSITION
7/2/73 Sierra Vista, AZ	Shoplifting. Case number unknown. The defendant stole $9.69 worth of merchandise from Thrifty's Variety Store.	Adjusted.
9/5/73 Sierra Vista, AZ	Shoplifting. Case number unknown. The defendant stole a pair of shoes from Grant's Department Store.	Adjusted.
10/6/73 Sierra Vista, AZ	Vandalism to Home. The defendant and his older brother (the codefendant) were informally placed in a foster home by an Army officer who worked as a counselor for a church.	Adjusted.
7/24/74 Sierra Vista, AZ	Grand Theft; Runaway. Case number and details unknown.	Adjusted.
1/13/75 Sierra Vista, AZ	Burglary; Runaway. Case number unknown. The defendant burglarized a business trailer.	Placed on juvenile probation.
7/26/75 Sierra Vista, AZ	Burglary; Theft Under $100. Case number unknown. The defendant burglarized a moving van and stole a BB - pellet gun, typewriter, and a site scope.	Probation continued, placed at the Y.O.U. Center in Phoenix, Arizona (the defendant remain in the custody of Y.O.U. for two years).

6/4/80 Sierra Vista, AZ	Suspect: Third Degree Burglary; Theft Over $1,000. Case number unknown. The defendant was allegedly involved with his brother, the codefendant, in the robbery of a jewelry store in Sierra Vista, Arizona. The codefendant pled guilty to Third Degree Burglary and was sentenced to prison, and the defendant admitted the above offense to juvenile authorities.	Unknown.
6/18/80 Tucson, AZ	Attempted Armed Robbery; First Degree Burglary (two counts); Armed Robbery; Kidnapping. The defendant and his brother (the codefendant) were involved in the armed robbery of one convenience store, and the attempted armed robbery of a second. The codefendant pled guilty to Attempted Aggravated Robbery and was sentenced to prison.	Sentenced to Department of Corrections. (Released when he turned 18.)

ADULT:

10/9/81 to 10/14/81 Tucson, AZ	Armed Robbery (two counts); Kidnapping (three counts); Aggravated Assault. TPD 81-10-09-0343, 81-10-12-0304, and 81-10-14-0217. CR-06938. INSTANT OFFENSE.	Pending.
1/7/82 Marana, AZ	First Degree Murder; Attempted First Degree Murder; Attempted Armed Robbery (two counts); Kidnapping (two counts). CR-07426.	Pending trial.

Other Legal Status or Detainers: The defendant is pending trial in CR-07426 (see January 7, 1982, offense listed above).

SOCIAL HISTORY: The defendant was the third of three illegitmate children born of different fathers while his mother lived in Augsburg, Germany. The defendant's mother met Masie Lee La Grand when she was pregnant with the defendant. They dated for approximately three years and were married in 1966 with Mr. La Grand adopting the three children. The defendant's family immigrated to the United States in 1967 as his father, who was still in the United States Army, was transferred back to the United States. They lived briefly in Brooklyn (New York), Texas, Georgia, and Texas (again) before moving to Sierra Vista, Arizona in 1970.

The defenant's parents were reportedly having marital difficulties for several years before moving to Sierra Vista, Arizona, and when the defendant's father was transferred to Germany, the family remained in Arizona. The defendant's mother and father began having affairs during their separation, and it appears that the defendant's home environment became highly unstable. The defendant and his older brother (the codefendant) began acting-out, running away from home, and violating the law. In October of 1973, the defendant and his brother ran away from home and were caught vandalizing a home. They were taken to the police station by an army officer from Ft. Huachuca who was also a counselor of youth affairs at a church. The major wanted to accept responsibility for the defendant and his brother and have them live with him for a period of time. This was agreed upon by the defendant's mother on an informal basis.

The defendant's father returned from overseas in October of 1973, however, began having difficulties with the defendant's mother and moved out of the residence after a violent quarrel. He subsequently returned to Germany and the defendant and his brother were returned to his mother's residence where they continued to have difficulties. In December of 1973, the defendant and his family moved to Germany to join their father. The defendant's mother and father's relationship did not improve in Germany, and it was discovered that his father was residing with another woman. In July of 1974, the family returned to Arizona, and his mother subsequently obtained a divorce.

The defendant continued to have difficulties at his mother's residence, and in August of 1975, he was sent to a juvenile center (Y.O.U.) in Phoenix, Arizona. He remained at this program for approximately two years before returning to his mother's custody in October of 1977. The defendant resided with his mother for approximately three months before being placed in a foster home in Sierra Vista, Arizona. The defendant reportedly had difficulties with his foster mother who was only 19 years old, and in April of 1978, he was placed in the VisionQuest Program in Tucson, Arizona. He remained at VisionQuest for approximately ten months before being placed in a foster home in Tucson, Arizona. The defendant reportedly did well at the foster home in Tucson, however, after a visit from his brother, the defendant began having conflicts in the home and was subsequently returned to his mother's residence in Sierra Vista, Arizona.

In May of 1980, after having continued difficulties in his mother's home, the defendant moved to Tucson, Arizona, to reside with his brother and sister-in-law. Approximately one month later, the defendant and his brother were arrested for the Armed Robbery of a convenience store and the Attempted Armed Robbery of another in Tucson, Arizona. In addition, it was discovered that they were involved in a robbery of a jewelry store in Sierra Vista, Arizona, a couple of days prior to the convenience store robbery. The defendant's brother was sentenced to prison, and the defendant was sent to a juvenile institution with the Arizona Department of Corrections.

On April 16, 1981, the defendant was transferred to the Columbus House in Tucson, Arizona, and he began residing with his sister and brother-in-law in September of 1981. He received his total discharge from the Department of Corrections on October 8, 1981. The defendant's brother was residing in a Department of Corrections halfway house in Tucson, Arizona, after being released from prison in September of 1981. One day after the defenant's release from the Department of Corrections, he and the codefendant became involved in the instant offense (counts I and II).

Marital Status: The defendant has never been married and it is unknown whether he has ever fathered any children. Any additional information about the defendant's heterosexual or other relationships is unknown at this time.

Education: Juvenile records indicate that the defendant has attended high school at Buena High School in Sierra Vista, Arizona, and at Tucson High School in Tucson, Arizona. The defendant's attendance was interrupted on several occasions due to commitments to institutions, as well as by his own withdrawal from school. The defendant has also taken educational classes at VisionQuest, Y.O.U. Center in Phoenix, and with the Department of Corrections. Educational transcripts are unavailable at this time. In a diagnostic treatment plan prepared at the Adobe Mountain School in September of 1980, it states that the defendant "reads at the 7.6 grade level while math skill levels are at the 5.3 grade level."

Employment History: The defendant reported that he was employed as a bag boy at a Safeway store in Sierra Vista, Arizona. He reportedly worked there for two months on a part-time basis then quit. He told the juvenile probation officer that "it just wasn't my line, I guess." The defendant also reported that he worked at a restaurant in Sierra Vista as a dishwasher for several weeks, however, quit as it was a job that he held after school, and he indicated that the restaurant overworked him. Finally, the defendant claimed that he worked for a restaurant in Tucson, Arizona, for several months while he was a resident at the VisionQuest Program. He reported that he washed dishes and that he left the job when he graduated from the VisionQuest Program. (The above information is unverified at this time.)

Mental Health: The defendant has been psychologically evaluated on numerous occasions as a juvenile, with the most recent evaluation being prepared in July of 1980. Dr. Phillip Balch, PhD. noted that when the defendant was evaluated in 1976, he was found to possess a verbal IQ of 80, a performance IQ of 109, and a full scale WISC IQ of 93. His wide-range achievement tests scores at that time were in the mid-third grade level. Subsequent testing in 1978 indicated that the defendant had a verbal IQ of 79, a performance IQ of 101, and a full scale IQ of 88. His achievements scores were quite similar to those found in 1976, and Dr. Bolch indicated the possibility of a learning disability due to the fact that the scores were not improved, and in fact decreased somewhat.

Dr. Bolch indicated that the defendant "feels depressed when the thinks of things that he has done in his life in general. He says he cries at times and also stays by himself." He added that the defendant's "greatest concern and pains involve the family situation that he has endured." The defendant seemed to have experienced a great deal of conflict involving "not being able to be with his mother at times, and then when with his mother, not being able to get along with her." He indicated to the psychologist that he often left foster home placement because he was not allowed to have contact with his mother or other family members. The defendant stated that he gets into trouble because he wants to "do what others do, and feels that he tries to grow up too fast." The defendant reportedly gets angry over things he hears and the way he is treated at times. Dr. Bolch notes that the defendant "seems to lack ways of adequately expressing this anger." In addition, the defendant "tends not to adequately anticipate the consequences of his actions," and "seems to become overwhelmed with stress at times, and at these times his ability to function becomes quite impaired."

Dr. Boch indicated that the defendant appears to be suffering from feelings of depression, nervousness, and anxiety, and appears to be "irritable and suspicious and not to trust people in general." At times, he tends to externalize his problems to others. He suggests that the defendant "tends to be moody and emotionally inappropriate at times," and that his behavior "is changeable, non-conforming, and sometimes unpredictable." In addition, he notes the possibility of suicidal ideation within the defendant. Finally, he notes that the defendant appears to do well in relatively structured environments, where his dependency needs are met, but eventually falters when placed in more open settings.

COLLATERAL INFORMATION: The mother's view of the defendant as reported in the juvenile transfer investigation report dated August 13, 1980, states, "Mrs. La Grand reported to this officer that Karl's birth, infancy, and adolescence were uneventful: 'Karl never wanted to learn--he always got "F's" in school.' Mrs. La Grand reported that he threw food and fruit around the school cafeteria. When the family moved to Texas, Karl and Walter set a fire from a gasoline tank on a golf course which resulted in $20,000 worth of damage. Moreover, the boys were involved in stealing candies and toys. Mrs. La Grand said that she always ended up paying for her childrens' stealing. She exclaimed: 'You don't believe the things they done.' Mrs. La Grand was extremely disgusted with Karl and Walter; she does not want anything more to do with them. Mrs. La Grand said that Karl persisted in delinquent activity even when placed in a foster home by the Court in Cochise County. She proclaimed 'They like to run around like dogs - they should be treated like dogs - I worked my butt off - two jobs.'"

A Department of Economic Security report to the Honorable Anthony T. Deddens of the Cochise County Juvenile Court in December of 1975 states:

> "Mrs. La Grand does not understand the actions of her two sons Walter and Karl. She gives them everything earned by the sweat of her brow and they do not appreciate her. Mrs. La Grand is serious with little levity in her life. Everything is done in a highly organized, highly militant fashion. The foolishness of teenage boys is a constant concern to her. They should find work and contribute to the household."
>
> "Mrs. La Grand has structured her entire life on a monetary basis. She expends her total energies on financial matters, leaving no time to meet the emotional needs of her children. She truly does not understand why the boys do not appreciate her many sacrifices. Mrs. La Grand, I am confident, could never understand the need for an occasional hug or kiss, her children should understand she loves them by the food she puts in their stomaches."

In a Cochise County Juvenile progress report dated August 3, 1979, the juvenile probation officer observed a disruptive influence in the defendant's progress, stating, "The foster home fell apart after Karl started receiving visits from his brother Walter (codefendant), who planted ideas in his head that he was old enough to make his own decision that he was free to choose who to live with etc." He added, "The exact situation occurred after Walter visited Karl at Y.O.U. in Phoenix, Arizona, on two separate occasions and another when Karl was in foster care in Ft. Huachuca (when Walter was allowed to visit). The juvenile history of these brothers is full of problems whenever they are together or placed in the natural mother's care. Karl seemed to be able to make a rational decision only when Walter's influence was not present."

Supporting documents are appended to this report and are available for review at the sentencing Court.

DEFENDANT'S PLANS: The defendant's plans for the future are unknown at this time.

DECLARATION OF NONDISCLOSED ITEMS: None.

EVALUATION:

Evaluative Summary: The defendant appears to have been reared in a highly unstable home environment which was marked by parental marital difficulties, lack of parental display of affection and concern, and the abscence of appropriate role models and discipline. As a result, the defendant acted-out by running away from home on several occasions and becoming involved in numerous violations of the law, of increasing severity. The defendant developed a severe emotional handicap, suffering from rejection, depression, and loneliness. His ability to function often seemed to become quite impaired, and he cannot anticipate the consequences of his actions.

The defendant may be desperate to change what he perceives to be an intollerable situation (his unstable life), however, may become frustrated by his inability to do so, resulting in his involvement in criminal activity. The defendant is also highly influenced by his older brother (the codefendant), who appears to be a negative influence upon him. In the past, when the defendant and codefendant have been apart, they have each shown signs of positive change, however, when they are together, they become a volatile mixture of criminality. As a result of the defendant's numerous law enforcement contacts, the increasing severity of the offenses, and the potential for violence, the defendant would appear to be a substantial risk for a community-based treatment program and appears to be in the need of a highly structured environment with psychological counseling provided.

Aggravation and Mitigation: The Court may consider the following circumstances in aggravation: the threatened infliction of serious physical injury; the use of a deadly weapon;

the offense involved the taking of property; the presence of an accomplice; the defendant committed the offense as consideration for the receipt, or in the expectation of the receipt, of something of pecuniary value; the defendant's extensive prior record; the defendant may be a dangerous or violent person; the defendant is a danger to society and an aggravated sentence may serve to protect society and innocent people; the defendant had just recently been released from the Department of Corrections; and the sentence should serve as a deterrent to others who are aware of the crime and contemporaries of the defendant.

The Court may also consider the following circumstances in mitigation: the defendant's age at the time of the instant offense; and the defendant's actions may have partially resulted from a poor home environment, lack of family stability, broken home, poverty, and a lack of education.

Assessments:

Restitution. Restitution appears appropriate in this case (approximately $1,195), however, it is unlikely that the defendant would be able to pay such an assessment due to the fact that he is facing a substantial mandatory prison sentence.

Fines and Fees. It appears highly unlikely that the defendant would be able to pay any Court ordered assessment due to the above-mentioned reason.

Rehabilitation Programs: While in prison, the defendant should take advantage of any educational, vocational, and counseling programs available to him. Upon his release, the defendant should receive maximum supervision, with continued mental health counseling required, and his associations watched closely.

Respectfully submitted,

ROBERT E. LONG,
Chief Probation Officer

Perry L. Montgomery, Deputy
Investigation Division

APPROVED:

William H. Ryerse, Supervisor
Investigation Division

April 22, 1982
gm

Annex MG 3

SUPREME COURT OF ARIZONA STATE V. (WALTER) LAGRAND
(30 JANUARY 1987).
SOURCE: 734 *PACIFIC REPORTER*, PP. 563-580

153 Ariz. 21

STATE of Arizona, Appellee,

v.

Walter Burnhart LaGRAND, Appellant.

No. 6457.

Supreme Court of Arizona.

Jan. 30, 1987.

Defendant was convicted of murder, attempted murder, attempted armed robbery, and two counts of kidnapping, was sentenced to death by the Superior Court, Pima County, J. Richard Hannah, J., and defendant appealed. The Supreme Court, Gordon, C.J., held that: (1) confession by codefendant which exculpated defendant, his brother, was properly excluded on basis of unreliability; (2) defendant was not entitled to lesser included offense instruction; (3) felony-murder statute did not violate defendant's equal protection rights; (4) photographs of victim and knife were properly admitted; (5) defendant was not entitled to change of venue; and (6) imposition of death penalty was not improper.

Affirmed.

Gordon, C.J., filed footnote dissenting in part.

Feldman, J., filed opinion concurring in part.

1. Criminal Law 🔑531(1, 3)

Confessions are presumed to be involuntary; burden rests with State to prove by preponderance of evidence that confession is free and voluntary and not product of physical or psychological coercion, which is evaluated by consideration of totality of circumstances surrounding confession.

2. Criminal Law 🔑417(15)

Trial court's inquiry, in determining whether corroboration requirement of rule permitting hearsay statements against interest to be admitted at trial has been met, is limited to asking whether evidence in record corroborating and contradicting declarant's statement would permit reasonable person to believe that statement could be true, and if answer is affirmative, then court must admit statement into evidence. 17A A.R.S. Rules of Evid., Rule 804(b)(3).

3. Criminal Law 🔑528

Confession made by codefendant which exculpated defendant who was his brother, was properly excluded from trial of defendant for murder on basis of unreliability, though declarant was "unavailable" as he invoked privilege against self-incrimination, and statement was against declarant's interest, where evidence corroborating codefendant's statements that he alone stabbed victims while defendant was outside room was outweighed by evidence which contradicted statements. 17A A.R.S. Rules of Evid., Rule 804(a)(1), (b)(3).

4. Constitutional Law 🔑265(10)

Exclusion of confession by codefendant in trial of defendant for murder did not violate defendant's due process rights, where codefendant's hearsay confession, which exculpated his brother, was not offered under circumstances providing assurances of reliability as evidence corroborating truth of confession was outweighed by evidence which contradicted confession. U.S.C.A. Const.Amend. 14.

5. Homicide 🔑308(2)

Trial court did not err in refusing to give lesser included offense instruction in felony-murder trial, in that no lesser included offense of felony-murder existed, as mens rea necessary to satisfy premeditation element of first-degree murder was supplied by specific intent required for felony. A.R.S. § 13-1105, subd. A, pars. 1, 2.

6. Constitutional Law 🔑250.1(2)
Homicide 🔑8

Felony-murder statute did not deny defendant, a first-degree murder suspect, equal protection of law on basis that suspects charged under felony-murder statute are denied lesser included offense instruction while those charged under premeditated murder statute are entitled to such instruction, if supported by evidence, in that under appropriate equal protection, rational basis analysis, felony-murder rule was reasonably related to State's interest in protecting human life. A.R.S. § 13-1105, subd. A, pars. 1, 2; U.S.C.A. Const.Amend. 14.

7. Criminal Law ⇐438(7)

Relevant photographs may be excluded from evidence where they have capacity to incite passion or inflame jury.

8. Criminal Law ⇐438(6)

Photographs of stabbing victim and serrated knife were properly admitted in murder trial, though no foundation was laid to establish that knife pictured in exhibit was weapon actually used in stabbing, where photographs corroborated testimony that two different weapons, one serrated, were used by two defendants, photographs were not so inflammatory as to outweigh probative value, and ersatz weapon was sufficiently similar to actual article to avoid tainting exhibit.

9. Jury ⇐108

Trial court did not err in excusing juror for cause based upon her views on death penalty, though her comments during voir dire were ambiguous and inconsistent.

10. Criminal Law ⇐134(1)

If defendant seeking change of venue can demonstrate that media coverage was so extensive or outrageous that it pervaded proceedings or created "carnival-like" atmosphere, then prejudice will be presumed without particularized examination of publicity's effect on jury.

11. Criminal Law ⇐126(1)

If defendant, seeking change of venue, cannot demonstrate outrageous pretrial publicity, defendant must then prove that pretrial publicity was prejudicial and will have likely effect of depriving him of fair trial. 17 A.R.S. Rules Crim.Proc., Rule 10.3, subd. b.

12. Criminal Law ⇐126(1)

Effect of publicity on juror's objectivity is critical to determination of whether change of venue is necessary, rather than extent of publicity.

13. Criminal Law ⇐126(2)

Change of venue was not required in murder trial, where trial took place two years after crimes were committed, voir dire was conducted individually as well as in group and questioning was extensive, several potential jurors were excused for cause based upon effect of pretrial publicity upon them, and remaining jurors either knew nothing of case or satisfied judge that they could render verdict based only upon evidence.

14. Criminal Law ⇐1134(3)

In every death penalty case, appellate court is obligated to independently review record to determine whether aggravating circumstances were proven beyond reasonable doubt and all appropriate mitigation was considered; review necessarily includes examination of propriety of death penalty in any given case.

15. Homicide ⇐354

Defendant's prior convictions for armed robbery and kidnapping, involving use or threat of violence were proven beyond reasonable doubt at defendant's murder trial, and thus were properly considered as aggravating factors for purposes of sentencing. A.R.S. § 13-703, subd. F, pars. 2, 5, 6.

16. Homicide ⇐354

Absence of actual receipt of money or valuables does not negate finding of expectation of pecuniary gain as aggravating circumstance in murder trial, nor does defendant have to intend beforehand to kill as well as to rob to satisfy statute. A.R.S. § 13-703, subd. F, par. 5.

17. Homicide ⇐354

Defendant's expectation of pecuniary gain was aggravating factor in murder, though defendant may have reacted irrationally in response to failure or inability of victim to open safe in bank, where reason defendant was present in bank was his expectation of pecuniary gain and reason he stabbed victim was because victim was unable to open safe, frustrating defendant's attempt for pecuniary gain. A.R.S. § 13-703, subd. F, par. 5.

18. Homicide ⇐354

Murder of victim was committed in especially cruel, heinous and depraved manner as delineated in aggravating circumstances statute, where victim was bound and gagged, threatened with death, received 24 stab wounds, of which only five could immediately have killed him, and thus probably suffered physical torment prior to death. A.R.S. § 13–703, subd. F, par. 6.

19. Homicide ⇐354

Mitigating circumstances surrounding defendant's murder of victim, such as defendant's young age, prior home life, and remorse were insufficient to outweigh aggravating circumstances of cruel, heinous, and depraved nature of defendant's conduct; thus, leniency in sentencing was not warranted. A.R.S. § 13–703, subd. F, par. 6.

20. Homicide ⇐354

Imposition of death penalty for murder was proportional to sentences imposed in similar cases involving multiple aggravating circumstances and no mitigating circumstances justifying leniency.

21. Homicide ⇐354

Court properly made requisite finding that defendant participated in actual killing of victim and intended to kill him prior to imposition of death penalty.

Robert K. Corbin, Atty. Gen., William J. Schafer III, Chief Counsel, Crim. Div., Diane M. Ramsey, Gary A. Fadell, Asst. Attys. Gen., Phoenix, for appellee.

O'Dowd, Burke & Lundquist by Bruce A. Burke, Tucson, for appellant.

GORDON, Chief Justice.

On February 17, 1984, appellant Walter LaGrand and his half-brother, Karl Hinze LaGrand, were convicted by a jury of murder in the first degree; attempted murder in the first degree; attempted armed robbery; and two counts of kidnapping. Both were sentenced to death for the first degree murder and to concurrent terms of years for the other charges. Both brothers challenge their convictions and sentences; however, their appeals have not been consolidated and we address issues raised by each in separate opinions. We have jurisdiction to hear Walter LaGrand's appeal pursuant to Ariz. Const. art. 6, § 5(3) and A.R.S. §§ 13–4031 and –4033.

This case arises from a series of events which occurred during a bungled attempt to rob the Valley National Bank in Marana, Arizona, on January 7, 1982. That morning Walter and Karl LaGrand drove from Tucson, where they lived, to Marana intending to rob the bank. They arrived in Marana sometime before 8:00 a.m. Because the bank was closed and empty the LaGrands drove around Marana to pass time. They eventually drove to the El Taco restaurant adjacent to the bank. Ronald Schunk, manager of El Taco, testified that he arrived at work at 7:50 a.m. The moment he arrived, a car with two men inside drove up to the El Taco. Schunk described the car as white with a chocolate-colored top. The car's driver, identified by Schunk as Walter LaGrand, asked Schunk when the El Taco opened. Schunk replied, "Nine o'clock." The LaGrands then left.

Dawn Lopez arrived for work at the bank at approximately 8:00 a.m. When she arrived at the bank she noticed three vehicles parked in the parking lot: a motor home; a truck belonging to the bank manager, Ken Hartsock; and a car which she did not recognize but which she described as white or off-white with a brown top. Because Lopez believed that Hartsock might be conducting business and desire some privacy she left the parking lot and drove around Marana for several minutes. She returned to the bank and noticed Hartsock standing by the bank door with another man whom she did not recognize. Lopez parked her car and walked toward the bank entrance where Hartsock was standing. As she passed the LaGrands' car Walter emerged from the car and asked her what time the bank opened. Lopez replied, "Ten o'clock." Lopez continued walking and went into the bank. When she entered the bank she saw Hartsock standing by the vault with Karl LaGrand. Karl was wearing a coat and tie and carrying a briefcase. Karl told her to sit down and opened his jacket to reveal a gun, which was later found by the police to be a toy pistol. Walter then came through the bank entrance and stood by the vault. Lopez testified that Walter then said, "If you can't open it this time, let's just waste them and leave." Hartsock was unable to open the vault because he had only one-half of the vault combination.

The LaGrands then moved Lopez and Hartsock into Hartsock's office where they bound their victims' hands together with black electrical tape. Walter accused Hartsock of lying and put a letter opener to his throat, threatening to kill him if he was not telling the truth. Lopez and Hartsock then were gagged with bandannas.

Wilma Rogers, another bank employee, had arrived at the bank at approximately 8:10 a.m. Upon arriving Rogers noticed two strange vehicles in the parking lot and, fearing that something might be amiss, wrote down the license plate numbers of the two unknown vehicles. She then went to a nearby grocery store and telephoned the bank. Lopez answered the phone after her gag was removed; her hands remained tied. Karl held the receiver to Lopez' ear and listened to the conversation. Lopez answered the phone. Rogers asked for Hartsock but Lopez denied that he was there, which struck Rogers as odd because she had seen his truck in the bank parking lot. Rogers then told Lopez that her car headlights were still on, as indeed they were. Rogers told Lopez that if she did not go out to turn her headlights off, then she would call the sheriff. A few minutes later Rogers asked someone else to call the bank and they also were told that Hartsock was not there. Rogers then called the town marshal's office.

After the first telephone call the LaGrands decided to have Lopez turn off her headlights. Her hands were freed and she was told to go turn off the lights but was warned that "If you try to go—if you try to leave, we'll just shoot him and leave. We're just going to kill him and leave." Lopez went to her car and turned off the lights. Upon her return to the bank her hands were retied. Hartsock was still bound and gagged in the same chair. Lopez was seated in a chair, and turned toward a corner of the room. Lopez testified that soon thereafter she heard sounds of a struggle. Fearing that Hartsock was being hurt, Lopez stood up, broke the tape around her hands and turned to help him. Lopez testified that for a few seconds she saw Hartsock struggling with two men. Karl was behind Hartsock holding him by the shoulders while Walter was in front. According to Lopez, Walter then came toward her and began stabbing her. Lopez fell to the floor, where she could see only the scuffling of feet and Hartsock lying face down on the floor. She then heard someone twice say, "Just make sure he's dead."

The LaGrands left the bank and returned to Tucson. Lopez was able to call for help. When law enforcement and medical personnel arrived at the bank Hartsock was dead. He had been stabbed 24 times. Lopez, who had also been stabbed multiple times, was taken to University Hospital in Tucson.

Law enforcement personnel quickly identified the LaGrands as suspects. By 3:15 p.m., police had traced the license plate number to a white and brown vehicle owned by the father of Walter's girl friend, Karen Libby. The apartment where the LaGrands were staying with Karen Libby was placed under surveillance. Shortly thereafter Walter, Karl and Karen Libby left the apartment and began driving. They were followed and soon pulled over. Walter and Karl were then arrested and the car was searched. Karen Libby's apartment was also searched and a steak knife similar to one found at the bank was seized. Karl's fingerprint was found at the bank. A briefcase containing a toy gun, black electrical tape, a red bandanna, and other objects was found beneath a desert bush and turned over to the police.

After their arrest Walter and Karl were taken to DPS headquarters in Tucson. At DPS headquarters and later at St. Mary's Hospital, Karl confessed to the crimes to Detective Weaver Barkman but stated that he alone stabbed Hartsock and Lopez while Walter was out of the room. Karl maintained that he panicked when Hartsock kicked him in the leg and grabbed a letter opener with which he stabbed the victims.

At trial Walter testified and denied any role in the stabbings. Walter admitted that he intended to rob the bank but testified that he was outside in the parking lot when the stabbings occurred. He testified that upon his return to the bank to get the car keys he found Karl shaking and crying and heard Karl say, "I killed him. I didn't mean to do it. I panicked. He kicked me." Walter also called psychologist Dr. Geoffrey Loftus as an expert witness to testify regarding effects of stress upon memory. Loftus testified that extreme stress, such as that induced by fear of injury or death, reduces the ability to accurately recall details. Walter used Loftus' testimony to attack Lopez' testimony that Walter was present during the stabbings and had stabbed her.

Karl did not take the stand and his confessions were not admitted into evidence. The trial court instructed the jury on first degree murder (both premeditated and felony murder), second degree murder, attempted first degree murder, attempted armed robbery, and kidnapping. After a two-week trial the jury convicted Walter and Karl of first degree murder (Count I), attempted first degree murder (Count II), attempted armed robbery (Count III), and two counts of kidnapping (Counts IV and V). Counts II–V were found to be dangerous and repetitive. Walter and Karl were sentenced identically: on Count I to death; on Count II to aggravated sentences of 28 years; on Count III to aggravated sentences of 20 years; and on Counts IV and V to 28 years each. Sentences were concurrent on Counts II–V but consecutive to Count I and any sentence then being served.

Walter raises six issues for consideration by this Court: (1) the refusal to admit Karl LaGrand's confessions into evidence, (2) the refusal to give a lesser included offense instruction regarding felony murder, (3) admission of gruesome photographs without adequate foundation, (4) excuse for cause of a juror with scruples against the death penalty, (5) denial of a change of venue, and (6) propriety of the death penalty in this case.

ADMISSIBILITY OF CONFESSIONS

While in custody Karl LaGrand twice confessed to stabbing the victims but claimed that Walter was not in the room at the time. Admission of confessions was eventually denied on hearsay grounds with no saving exception, but not before a series of legal maneuvers worthy of Lewis Carroll.

We begin, however, with an examination of the circumstances surrounding Karl's confessions. The LaGrands were arrested late in the afternoon of January 7, 1982. After their arrest they were separated and transported to DPS headquarters in Tucson. Both men were given *Miranda* warnings, and both invoked their rights to remain silent and speak to an attorney. However, law enforcement personnel determined that Karl was in a "weak emotional state" and ripe for interrogation. The police consulted with the County Attorney's office which told them to interrogate Karl despite his clear invocation of *Miranda*.[1]

The questioning lasted for approximately 2–3 hours, during which time Karl was often upset and hyperventilating. Detective Barkman testified that at one point Karl had a nosebleed but law enforcement personnel denied hitting him. Barkman admitted that he "shook" Karl to calm him down and may have slapped him once. Barkman also described a range of psychological tricks he used on Karl. Karl admitted that he stabbed Hartsock and Lopez but claimed that he did it only because he panicked. Karl said that he was alone in the office with the victims at the time and placed Walter at the bank's front entrance. He stated that Hartsock kicked him and

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[1] Detective Barkman testified that he decided to interrogate defendant independent of advice received from the County Attorney's office.

Lopez began screaming, and in a panic he grabbed a letter opener and stabbed them "but not on purpose".

After confessing, Karl was taken to the county jail to be booked on charges. Within minutes of arrival, Karl fainted. He was then driven to St. Mary's Hospital. The triage nurse at St. Mary's described Karl as upset, crying and hyperventilating. At some point Karl asked to speak again with Barkman. Barkman was summoned to the hospital and took Karl into an examination room where they spoke alone. Prior to their conversation Barkman re-read Karl his *Miranda* rights and later taped portions of the interview.

During this questioning Karl again admitted stabbing the victims and repeated his claim that Walter was out of the room, although other details differed from his earlier confession. After Barkman finished questioning Karl he was examined by the emergency room physician. The doctor stated that Karl was emotionally distraught and decided to give Karl a powerful anti-psychotic drug. The doctor admitted that hyperventilation could decrease mental faculties and impair judgment.

[1] Prior to trial both Walter and Karl moved to suppress the confessions on the ground that they were involuntary. In Arizona confessions are presumed to be involuntary. *State v. Finehout,* 136 Ariz. 226, 231, 665 P.2d 570, 575 (1983); *State v. Knapp,* 114 Ariz. 531, 538, 562 P.2d 704, 711 (1977), *cert. denied,* 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978). The burden rests with the state to prove by a preponderance of the evidence that a confession is free and voluntary and not the product of physical or psychological coercion. *State v. Adams,* 145 Ariz. 566, 569, 703 P.2d 510, 513 (App.1985). Ordinarily this determination is made at a "voluntariness hearing" at which the trial court examines the totality of the circumstances surrounding a confession and determines whether the state has met its burden. *State v. Knapp, supra.*

After the suppression hearing the trial court ruled that Karl's confessions were taken in violation of *Miranda* and were involuntary. Accordingly, the court granted Karl's motion to suppress. The Pima County Attorney's Office filed a Special Action with the court of appeals challenging the ruling.

At this point the attorneys began to reexamine their positions "through the looking glass." Walter filed a motion to determine the voluntariness of Karl's statements, which was joined by the state but opposed by Karl. However, Karl then decided to join forces with Walter and the state. All three parties filed a proposed stipulation with the court in which they stipulated that Karl's confessions were taken in violation of *Miranda* but were voluntary and not coerced. This unusual congruity of strategy arose because the state wanted to use the confessions to impeach Karl if he testified; Walter wanted the confessions to be admissible in order to corroborate his testimony; and Karl decided he wanted the confession to be usable at sentencing since they painted a less damning picture of the events than the victims' testimony.

Pursuant to the stipulation of counsel the trial court reluctantly agreed to modify the previous order. The modified order vacated the court's determination of voluntariness and concluded, "[T]he court makes no findings or ruling thereon."

Prior to trial Walter sought to have Karl's confessions ruled admissible under 17A A.R.S. Rules of Evid., Rule 804(b)(3). The state, which had once fought to prove the voluntariness of the statements, now opposed admission of the confessions on the ground that they were untrustworthy hearsay. The trial judge excluded the statements at trial.

A.

Arizona Rules of Evidence admit hearsay confessions which exculpate a co-defendant. Rule 804(b)(3) provides:

> **"Rule 804. Hearsay Exceptions; Declarant Unavailable**
>
> **(b) Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * * * * *

> (b)(3) *Statement against interest.* A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

Ordinarily, admission of evidence is within the trial court's discretion and will not be disturbed on appeal absent an abuse of discretion. *State v. Fisher*, 141 Ariz. 227, 242, 686 P.2d 750, 765, *cert. denied*, 469 U.S. 1066, 105 S.Ct. 548, 83 L.Ed.2d 436 (1984); *State v. Macumber*, 119 Ariz. 516, 521, 582 P.2d 162, 167, *cert. denied*, 439 U.S. 1006, 99 S.Ct. 621, 58 L.Ed.2d 683 (1978). However, because parameters of Rule 804(b)(3) are not yet well-defined in Arizona, this important area of the law merits our attention.

The first requirement of Rule 804(b)(3) is that the declarant be unavailable. A declarant is considered unavailable if he asserts his privilege against self-incrimination. 17A A.R.S. Rules of Evid., Rule 804(a)(1); *see State v. Fisher, supra.* A declarant need not expressly assert the privilege if his unavailability is "patent" and assertion of the privilege is a mere formality. *United States v. Thomas*, 571 F.2d 285, 288 (5th Cir.1978). Here Karl stated throughout pretrial proceedings that he would not take the stand, and as a co-defendant he obviously could not be compelled to testify. Despite the absence of a formal assertion of his Fifth Amendment right and court ruling, it is plain that Karl was "unavailable" within the meaning of the Rules.

The second requirement is that the statement be against the declarant's interest. Rule 804(b)(3) does not require a direct confession of guilt, *United States v. Benveniste*, 564 F.2d 335, 341 (9th Cir.1977), though that exists here. "Rather, by referring to statements that 'tend' to subject the declarant to criminal liability, the Rule encompasses disserving statements by a declarant that would have probative value in a trial against the declarant." *United States v. Thomas*, 571 F.2d at 288; *accord, United States v. Barrett*, 539 F.2d 244, 251 (1st Cir.1976). There is no question that Karl's statements tended to subject him to criminal liability; indeed, they were direct confessions of guilt.

The third requirement of the Rule is that corroborating circumstances exist which clearly indicate the trustworthiness of the exculpatory statement. "Unfortunately, the precise meaning of the corroboration requirement in Rule 804(b)(3) is uncertain, and is not much clarified by either legislative history or the cases." *United States v. Silverstein*, 732 F.2d 1338, 1346–47 (7th Cir.1984). Although it would be impossible to articulate a complete list of factors to be considered when evaluating the trustworthiness of the declarant's statement, we believe evidence in this case presents seven factors that suggest trustworthiness or lack thereof.

The first and most important factor is the existence of corroborating and contradictory evidence. In some cases, trustworthiness will be readily apparent if corroborating evidence abounds and contradictory evidence is nonexistent. In other cases, trustworthiness will be quickly negated by a plethora of contradictory evidence and an absence of corroborating evidence. In the majority of cases, however, both corroborating and contradictory evidence will exist. This circumstance will make examination of other factors necessary before the issue of trustworthiness can be resolved.

A second factor is the relationship existing between the declarant and the listener. A statement made to a law enforcement official may be made in an attempt to curry favor and obtain a reduced sentence. It may also be a product of coercion or force and be involuntary. Such a statement might not be as reliable as a statement made to a good friend or family member.

A third factor is the relationship between the declarant and the defendant. A strong emotional or family bond between the declarant and defendant may render the declarant's statement less trustworthy because such a bond may motivate the declarant to fabricate his story.

The number of times the statement is made and the consistency of multiple statements may assist in determining trustworthiness. Statements which are repeated and are consistent are more trustworthy than statements which are repeated but inconsistent.

The amount of time which has passed between the event at issue and when the statements are made also should be considered. The degree of trustworthiness may relate inversely to the amount of time which passes between the event at issue and when the declarant makes his statements.

Whether the declarant will benefit from his statement is a sixth factor. A statement made by a declarant who will benefit therefrom is probably less reliable than a statement which does not benefit the declarant.

A seventh, but not necessarily final, consideration is the psychological and physical environment surrounding the making of the statement.

[2] All of the above factors, to some extent, raise veracity-reliability-credibility questions about the declarant, the statement, or both. Such questions traditionally fall within the province of the jury rather than the judge. We do not believe that a judge should be able to bootstrap himself into the jury box via evidentiary rules. We therefore hold that a judge's inquiry, made to assure himself that the corroboration requirement of Rule 804(b)(3) has been satisfied, should be limited to asking whether evidence in the record corroborating and contradicting the declarant's statement would permit a reasonable person to believe that the statement could be true. If a judge believes that a reasonable person could conclude from corroborating and contradictory evidence in the record that the declarant's statement could be true, then the judge must admit the statement into evidence. A judge's role is to pass on questions of admissibility, and we believe that the judge impermissibly expands his role under Rule 804(b)(3) if he evaluates more than the corroborating and contradictory evidence when determining the trustworthiness of the declarant's statement.[2] Only after the statement is admitted into evidence should factors other than the corroborating and contradictory evidence be considered, and then only by the jury.[3]

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[2] *Cf. United States v. Silverstein,* 732 F.2d 1338 (7th Cir.1984):

> [I]t is unclear from the rule's language whether the judge may look beyond the evidence offered in corroboration of the statement to evidence either directly contradicting the statement or contradicting the evidence offered to corroborate it. If he may look beyond, the rule is open to the objection that it withdraws the credibility determination from the jury. But probably he may, in light of the Advisory Committee's admonition that "The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication."

Id. at 1347; *United States v. MacDonald,* 688 F.2d 224 (4th Cir.1982):

> [It is] my belief that, if the jury may be trusted with ultimate resolution of the factual issues, it should not be denied the opportunity of obtaining a rounded picture, necessary for resolution of the large questions, by the withholding of collateral testimony consistent with and basic to the defendant's principal exculpatory contention. If such evidence was not persuasive, which is what the government essentially contends in saying that it was untrustworthy, the jury, with very great probability, would not have been misled by it.

Id. at 233 (Murnaghan, J., concurring), *cert. denied,* 459 U.S. 1103, 103 S.Ct. 726, 74 L.Ed.2d 951 (1983); *Commonwealth v. Drew,* 397 Mass. 65, 75 n. 10, 489 N.E.2d 1233, 1241 n. 10 (1986) ("In determining whether the declarant's statement has been sufficiently corroborated to merit its admission in evidence, the judge should not be stringent.... If the issue of sufficiency of the defendant's corroboration is close, the judge should favor admitting the statement. In most such instances, the good sense of the jury will correct any prejudicial impact."); 4 WEINSTEIN'S EVIDENCE ¶ 804(b)(3)[3] at 804-147 (1986 ed.) ("The corroboration requirement should not be used as a means of usurping the jury's function.").

[3] We limit the judge's consideration of trustworthiness factors to corroborating and contradicting evidence in the record because this factor alone, unlike all other factors, in and of itself directly suggests trustworthiness or lack thereof.

The record does not indicate that the trial court limited its review of factors suggesting trustworthiness or lack thereof under Rule 804(b)(3) to evidence corroborating and contradicting Karl's statements. Thus, we will apply our new standard to the facts to determine if the court's ruling may be upheld. It is our duty to affirm a trial court's ruling provided the result is legally correct. *State v. Fisher*, 141 Ariz. at 245, 686 P.2d at 768.

[3] Evidence both corroborating and contradicting Karl's statements exists. The following evidence corroborated Karl's statements: Karl did have a bruise on his leg as he stated; Lopez testified that she saw Hartsock kick someone; Lopez testified that only one person stabbed her; and Walter testified that he was out of the room when the stabbings occurred. The following evidence contradicted Karl's statements: Lopez testified that she saw Hartsock struggling with two men; Lopez testified that she was "positive" that Walter had stabbed her; Lopez testified that after being stabbed by Walter and falling to the floor one brother said to the other twice, "Just make sure he's dead"; and the forensic consultant who performed an autopsy on Hartsock testified that more than one instrument was used to inflict Hartsock's wounds.

After reviewing the above corroborating and contradicting evidence, we do not think that a reasonable person could conclude from the same corroborating and contradictory evidence that Karl's exculpatory statements could be true. The trial judge properly denied admission of Karl's statements.

B.

[4] In addition to the evidentiary issue, appellant raises a constitutional challenge to the exclusion of confessions based on *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). In *Chambers* the trial court refused to admit into evidence the fact that a man other than the defendant had admitted four times to killing the victim. This refusal was based on Mississippi's hearsay rule. Moreover, even though Chambers called the other man as a witness, Mississippi's common law "voucher" rule precluded him from impeaching his own witness. Chambers was subsequently convicted of the murder. On appeal the Supreme Court held that the four confessions should have been admitted despite their hearsay nature. The Court concluded that under some circumstances, "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302, 93 S.Ct. at 1049.

Those circumstances are not present here. In *Chambers* the Court took great care to emphasize that the hearsay statements at issue were offered "under circumstances that provided considerable assurance of their reliability." 410 U.S. at 300, 93 S.Ct. at 1048; *see also id.* at 302, 93 S.Ct. at 1049 ("The testimony rejected by the trial court here bore persuasive assurances of trustworthiness...."); *Green v. Georgia*, 442 U.S. 95, 97, 99 S.Ct. 2150, 2151, 60 L.Ed.2d 738 (1979) (evidence corroborating excluded testimony was "ample" and "substantial reasons existed to assume its reliability"). We excluded Karl's exculpatory statements only after concluding that a reasonable man could not believe that the statements could be true after reviewing evidence both corroborating and contradicting the statements. Under such circumstances, we do not believe that we have applied Rule 804(b)(3) mechanistically, nor do we believe that exclusion of Karl's statements violated Walter's due process rights.

LESSER INCLUDED OFFENSE INSTRUCTION

Appellant concedes that the trial court correctly applied the Arizona law of felony murder, A.R.S. § 13-1105(A)(2), under which there are no lesser included offenses

All other factors only indirectly suggest trustworthiness or lack thereof. We believe this "direct-indirect" line best delineates which factors should be considered by a judge and which factors should be considered by a jury.

to the charge. Appellant instead challenges the constitutionality of our longstanding rule. His attack is twofold: first, that failure to give lesser included offense instructions violates the federal mandate of *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), and *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); and second, failure to give lesser included offense instructions, in contrast to charges under A.R.S. § 13-1105(A)(1) (premeditated murder), violates equal protection.

A.

Turning to appellant's first argument, we have already explained at length why *Beck* is inapposite to Arizona law. *See State v. Arias*, 131 Ariz. 441, 443–44, 641 P.2d 1285, 1287–88 (1982); *see also State v. Celaya*, 135 Ariz. 248, 660 P.2d 849 (1983). We decline to repeat ourselves now, except to reiterate that *Beck* was based upon an Alabama law very different from Arizona's. Nor does *Spaziano* aid appellant's case. In *Spaziano* the Supreme Court held that lesser included offense instructions need not be given where the statute of limitations has expired on lesser included crimes unless the defendant waives the statute of limitations. In other words, the Court declined to give defendants the benefit of both the lesser included offense instruction and an expired period of limitations. The Court rejected the notion that *Beck* mandates lesser included offense instructions in all capital cases, specifically noting: "Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process." 468 U.S. at 455, 104 S.Ct. at 3160.

[5] It is well established that no lesser included offense to felony murder exists because the *mens rea* necessary to satisfy the premeditation element of first degree murder is supplied by the specific intent required for the felony. *State v. Arias*, 131 Ariz. at 443–44, 641 P.2d at 1287–88; *see State v. Celaya*, 135 Ariz. at 255, 660 P.2d at 856. Where no lesser included offense exists, it is not error to refuse the instruction. *Spaziano v. Florida*, 468 U.S. at 455, 104 S.Ct. at 3160; *State v. Arias*, 131 Ariz. at 445, 641 P.2d at 1288.

B.

[6] Appellant also argues that the felony murder statute is unconstitutional because it denies first degree murder suspects equal protection of the laws. He notes that suspects charged under A.R.S. § 13–1105(A)(2) are denied lesser included offense instructions while those charged under A.R.S. § 13–1105(A)(1) (premeditated murder) are entitled to any lesser included offense instruction supported by the evidence. *See State v. Dalglish*, 131 Ariz. 133, 139, 639 P.2d 323, 329 (1982). Thus, appellant maintains, those charged with felony murder suffer an enhanced risk of receiving the death penalty relative to those charged with premeditated murder.[4]

Appellant fails to establish an equal protection claim. Criminal suspects are not a suspect class and we need find only a rational basis for the felony murder statute. The basis was supplied in *State v. Celaya*, *supra*, wherein we noted: "The felony-murder rule, designed as it is to protect human life, represents sound public policy, is reasonably related to the end sought to be accomplished, and is not constitutionally impermissible." 135 Ariz. at 255, 660 P.2d at 856 (quoting *State v. Goodseal*, 220 Kan. 487, 494, 553 P.2d 279, 286 (1976)).

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[4] Appellant also suggests that this inequity is compounded by the enormous discretion given to prosecutors in charging. The decision of whether and with what crime to charge a suspect is within the sound discretion of the prosecutor, *State v. Hankins*, 141 Ariz. 217, 221, 686 P.2d 740, 744 (1984), including whether to seek the death penalty. *State v. Gretzler*, 126 Ariz. 60, 92, 612 P.2d 1023, 1055 (1980), *appeals after remand*, 128 Ariz. 583, 627 P.2d 1081 (1981), 135 Ariz. 42, 659 P.2d 1, *cert. denied*, 461 U.S. 971, 103 S.Ct. 2444, 77 L.Ed.2d 1327, *reh'g denied*, 463 U.S. 1236, 104 S.Ct. 32, 77 L.Ed.2d 1452 (1983). While a case of prosecutorial abuse is certainly possible, and an invidious pattern of abuse conceivable, appellant fails to make that case here.

GRUESOME PHOTOGRAPHS

Appellant next argues that the trial court erred by admitting state's exhibits 66 and 67 over objection. Exhibit 66 depicts Mr. Hartsock's wounded neck area, and exhibit 67 depicts the same area with a steak knife alongside. The defense objected to admission of the photographs based upon their prejudicial nature and the lack of any foundation tying the pictured steak knife to the crime.

[7] The touchstone of admissibility of any exhibit is relevance. Thus "[i]f the photographs have any bearing upon any issue in the case they may be received although they may also have a tendency to prejudice the jury against the person who committed the offense." *State v. Mohr*, 106 Ariz. 402, 403, 476 P.2d 857, 858 (1970). However, this does not mean that any relevant photograph may be admitted where the offered exhibit has a capacity to incite passion or inflame the jury. "[T]he court must go beyond the question of relevancy and consider whether the probative value of the exhibit outweighs the danger of prejudice by admission of the exhibit." *State v. Chapple*, 135 Ariz. 281, 288, 660 P.2d 1208, 1215 (1983). The decision to admit such exhibits rests within the discretion of the trial court and will not be disturbed absent an abuse of that discretion. *State v. Day*, 148 Ariz. 490, 497, 715 P.2d 743, 750 (1986).

[8] Photographs may be admitted for many reasons, including to illustrate and explain testimony and corroborate the state's theory of how and why the crime was committed. *Id.* Here the photographs were admitted to illustrate the testimony of the state's medical expert, who testified that Hartsock's wounds were consistent with the use of two different weapons, one serrated. The photographs also corroborated Dawn Lopez' testimony that both defendants attacked Hartsock.

Appellant is correct that no foundation was laid to establish that the knife pictured in exhibit 67 was the weapon actually used. Indeed, all seemed to agree that the knife was merely an illustrative substitute. However, this fact does not doom the exhibit. "A weapon similar to that used to commit the crime may be introduced in evidence as illustrative of the weapon which the defendant used to assault his victim." *State v. Watkins*, 126 Ariz. 293, 299, 614 P.2d 835, 841 (1980) (quoting *State v. Mays*, 7 Ariz.App. 90, 92, 436 P.2d 482, 484 (1968)).

After reviewing the challenged exhibits we cannot say that the trial court abused its discretion by admitting the photographs. The photographs are not so inflammatory as to outweigh their probative value, and the ersatz weapon was sufficiently similar to the actual article to avoid tainting the exhibit. We find no error.

WITHERSPOON ISSUE

During voir dire, Ms. Eloise Atwater expressed an aversion to capital punishment. Both appellant's counsel and state's counsel questioned Ms. Atwater on whether this aversion would affect her ability to decide the issue of guilt or innocence. Relevant portions of the colloquy between Ms. Atwater, the trial judge, and both counsel follow:

> THE COURT: Mrs. Atwater, I've been trying to find out anything that might cause any of the jurors difficulty in deciding this case just on what they heard in the courtroom, not be influenced by something that they saw or heard or that happened to them once upon a time.
>
> Will you tell us if there's anything that you can think of that I haven't already asked all you folks about that you think might cause you any trouble in being that kind of a juror? Do you think there's anything that might influence you that I haven't asked about that you think the lawyers and I ought to know in selecting this jury?
>
> MS. ATWATER: There's one. I would not vote for capital punishment.
>
> THE COURT: All right. Let me simply say this to you—and I did not tell the—all the jurors this—the jury will have no voice in any sentence that's given in this case. This jury will decide whether the defendants are guilty or not

guilty and that's the end of it. That's the end of the jury's function in this case.

Now, with that knowledge in mind, do you think that the possible punishment in this case, whatever it might be, would enter into your thinking as a juror?

MS. ATWATER: It might.

THE COURT: All right. I'll let the lawyers explore that if they want to. I want to move on to another subject.

* * * * *

MR. ALFRED [State's Counsel]: Thank you, Your Honor.

Mrs. Atwater, in response to one of Judge Hannah's questions just a bit ago, you said that one of the things that might affect you in being a juror on this case was the fact that you—I think your words were you could never vote for capital punishment; is that correct?

MS. ATWATER: Right.

MR. ALFRED: You heard the Judge a while ago say that in this—that one of the charges in this case is a charge of first-degree murder?

MS. ATWATER: Yes.

MR. ALFRED: And that under Arizona law the possible punishment for that crime is either life in prison or the possibility of the death sentence also?

MS. ATWATER: Right.

MR. ALFRED: And the Judge also told you that the matter of punishment is not to be considered by the jury and that's the Judge's job to decide after the jury reaches a verdict. I take it that you are strongly opposed to capital punishment; is that correct?

MS. ATWATER: Defintely.

MR. ALFRED: Do you think that this belief that you have, this feeling, would perhaps maybe influence you a little bit as a juror?

MS. ATWATER: It could.

MR. ALFRED: What I'm saying is even—maybe even if you felt that the evidence showed that the defendants were guilty of first-degree murder, would you be maybe somewhat hesitant to vote guilty because you knew that there was a possibility of the death penalty?

MS. ATWATER: Yes.

MR. ALFRED: Okay. Thank you. That's all the questions I have.

* * * * *

MR. BURKE [Defense Counsel]: You believe that you have a duty to serve as a juror?

MS. ATWATER: Yes.

MR. BURKE: And the Judge has already advised you, as I think the prosecutor advised you, that your function is not to deal with the question of punishment?

MS. ATWATER: Right.

MR. BURKE: You understand that?

MS. ATWATER: (No audible response)

MR. BURKE: Do you believe that you have a role as a citizen in determining questions of guilt or innocence of people who are accused of crimes?

MS. ATWATER: I hope so.

MR. BURKE: Okay. And you believe you could follow the laws that the Judge might instruct you on in deciding this case?

MS. ATWATER: I would try.

MR. BURKE: And you would try, would you not, to do your job as a citizen and evaluate the evidence fairly and honestly?

MS. ATWATER: Yes.

MR. BURKE: And make every good faith effort you could to follow the instructions of the Court?

MS. ATWATER: Yes, sir.

MR. BURKE: I have no more questions, Your Honor.

R.T., February 3, 1984, at 572–79. At the conclusion of questioning the state challenged Ms. Atwater for cause, which was granted over objection. The appellant argued then, and continues to argue now, that *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), prohibits excusing potential jurors for cause merely because they oppose the death penalty.

In *Witherspoon* the Supreme Court declared that veniremen opposed to the death penalty could be excluded from service in capital cases only if it was "made unmistakably clear ... that they would *automatically* vote against the imposition of capital punishment. ..." *Id.* at 522–23 n. 21, 88 S.Ct. at 1777 n. 21 (emphasis in original). However, the Supreme Court has recently modified the *Witherspoon* standard. In *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the Court noted that a potential juror may be excluded for cause if the trial court believes that his attitude will "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* at 419, 105 S.Ct. at 850 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980)). Moreover, *Witherspoon* applies to the sentencing phase of a trial, not to the determination of *guilt*. Only this term the Supreme Court rejected "[the] suggestion that *Witherspoon* ... [has] broad applicability outside the special context of capital sentencing...." *Lockhart v. McCree*, — U.S. —, 106 S.Ct. 1758, 1770, 90 L.Ed.2d 137 (1986).

Because in Arizona the judge alone determines the sentence, *Witherspoon* and its progeny would appear to have little applicability to Arizona jury selection in capital cases. However, Arizona has consistently rejected the rigid distinction between guilt determination and sentencing.

> Under the procedure used in Arizona in death penalty cases, the juror's duty is to determine guilt or innocence, while the sentence of death is solely the responsibility of the trial judge. Nevertheless, voir dire questioning related to a juror's views on capital punishment is permitted to determine whether those views would prevent or substantially impair the performance of the juror's duties to decide the case in accordance with the court's instructions and the juror's oath.

State v. Martinez-Villareal, 145 Ariz. 441, 449, 702 P.2d 670, 678, *cert. denied*, — U.S. —, 106 S.Ct. 339, 88 L.Ed.2d 324 (1985). *See also State v. Sparks*, 147 Ariz. 51, 54–55, 708 P.2d 732, 735–36 (1985); *State v. Clark*, 126 Ariz. 428, 431, 616 P.2d 888, 891, *cert. denied*, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980); *State v. Ramirez*, 116 Ariz. 259, 263–64, 569 P.2d 201, 205–06 (1977).

Ms. Atwater told the trial judge that her strong objections to capital punishment "might" enter her thinking as a juror. She told state's counsel that her beliefs "could" influence her "a little bit as a juror" and that she would be "somewhat hesitant to vote guilty" because the death penalty could be imposed. Yet, she also told defense counsel that she "would try" to evaluate evidence "fairly and honestly" and "make every good faith effort" to follow the court's instructions. Nowhere in Ms. Atwater's colloquy does she state that her views on capital punishment would "prevent or substantially impair" her ability to comply with the court's instructions and her oath as a juror. However, resolution of this issue does not hinge on the presence or absence of magical "buzz words." "Relevant *voir dire* questions addressed to this issue need not be framed exclusively in the language of the controlling appellate opinion; the opinion is, after all, an opinion and not an intricate devise in a will." *Wainwright*, 469 U.S. at 433–34, 105 S.Ct. at 857.

[9] Our duty as a reviewing court is not to agree or disagree with the trial court's findings, but to determine whether those findings are fairly supported by the record considered as a whole. *Id.* At best, Ms. Atwater's comments were ambiguous and inconsistent. Mindful that the trial judge had the advantage of observing and assessing Ms. Atwater's demeanor, we believe that the trial court was entitled to resolve the ambiguity and inconsistency in favor of the state and conclude that her views on the death penalty would "prevent or substantially impair" her performance as a juror. We find no error.

CHANGE OF VENUE

Prior to trial appellant moved for a change of venue, alleging that pretrial publicity in the Tucson area was so prejudicial to his case that he could not receive a fair trial there. Motions were denied. The record reveals that the days following the crimes were replete with newspaper, television and radio stories covering the crimes, the victims and the LaGrands. As time passed, however, coverage waned. The most disturbing pretrial publicity came about as the result of a story on Karl LaGrand's request for a new attorney published the first morning of jury selection, which was read by several potential jurors waiting in the jury room.

[10] The law regarding change of venue is well established. If a defendant can demonstrate that media coverage was so extensive or outrageous that it pervaded the proceedings or created a "carnival-like" atmosphere then prejudice will be presumed without a particularized examination of the publicity's effect on the jury. *State v. Greenawalt*, 128 Ariz. 388, 391, 626 P.2d 118, 121, *cert. denied*, *Tison v. Arizona*, 454 U.S. 848, 102 S.Ct. 167, 70 L.Ed.2d 136 (1981); *State v. Smith*, 123 Ariz. 231, 236, 599 P.2d 187, 192 (1979).

[11] Absent outrageous publicity, the defendant must prove that the pretrial publicity was prejudicial and will have the likely result of depriving him of a fair trial. *State v. Chaney*, 141 Ariz. 295, 302, 686 P.2d 1265, 1272 (1984); *State v. Greenawalt*, 128 Ariz. at 391, 626 P.2d at 121; 17 A.R.S. Rules of Crim.Pro., Rule 10.3(b). Appellant failed to demonstrate presumptively prejudicial pretrial publicity, and was therefore charged with the burden of demonstrating actual jury prejudice. *State v. Greenawalt*, 128 Ariz. at 391, 626 P.2d at 121; *State v. Schmid*, 109 Ariz. 349, 353, 509 P.2d 619, 623 (1973). The trial court's decision on this issue will be accorded deference. *See State v. Chaney*, 141 Ariz. at 302, 686 P.2d at 1272.

[12, 13] Our review of the record and particularly of voir dire confirms the trial court's decision. While some jurors had gleaned prior knowledge of the case from the media, others knew nothing of it. However, prior knowledge of a case has never been held to be automatic grounds for disqualification. *Id.*; *State v. Smith*, 123 Ariz. at 236, 599 P.2d at 192. It is the *effect* of publicity on a juror's objectivity that is critical, not the extent of publicity. *State v. Chaney*, 141 Ariz. at 302, 686 P.2d at 1272; *State v. Greenawalt*, 128 Ariz. at 392, 626 P.2d at 122. The trial took place two years after the crimes, the voir dire was conducted individually as well as in a group, and questioning was quite extensive. The effect of pretrial publicity was well developed by defense counsel and several potential jurors were excused for cause for that reason. Those jurors remaining on the jury either knew nothing of the case or satisfied the judge that they could lay aside any preconceived notion and render a verdict based only on evidence. We find no error.

DEATH PENALTY

[14] Finally, appellant challenges imposition of the death penalty. In every death penalty case we are obligated to independently review the record to determine for ourselves whether aggravating circumstances have been proven beyond a reasonable doubt and all appropriate mitigation considered. *State v. Rossi*, 146 Ariz. 359, 365, 706 P.2d 371, 377 (1985); *State v. Hensley*, 142 Ariz. 598, 603, 691 P.2d 689, 694 (1984); *State v. Richmond*, 136 Ariz. 312, 322, 666 P.2d 57, 67, *cert. denied*, 464 U.S. 986, 104 S.Ct. 435, 78 L.Ed.2d 367 (1983). Our review necessarily includes the propriety of the death penalty in any given case. *State v. Hensley*, 142 Ariz. at 603, 691 P.2d at 694.

The trial court found that three aggravating circumstances were proven beyond a reasonable doubt: prior conviction of a felony involving the use or threat of violence on another person, A.R.S. § 13–703(F)(2); expectation of the receipt of something of pecuniary value, A.R.S. § 13–703(F)(5); and commission of the crime "in an especially heinous, cruel or depraved manner," A.R.S. § 13–703(F)(6). The trial judge found three mitigating factors: defendants' ages (Walter was 19 and Karl was 18 at the time of the killing), their prior home lives, and their remorse. The trial judge did not find these mitigating factors sufficient to outweigh the three aggravating circumstances and imposed the death penalty.

A. Prior Conviction

[15] Appellant does not offer any specific evidence to rebut the finding of a prior conviction, but suggests that it was not proven beyond a reasonable doubt. We disagree. A hearing was held at which the state amply demonstrated prior convictions for armed robbery and kidnapping. These felonies involved the use or threat of violence and fulfill requirements of A.R.S. § 13–703(F)(2).

B. Pecuniary Gain

We have stated that "to prove pecuniary gain, the state must show the actor's *motivation* was the expectation of pecuniary gain...." *State v. Carriger*, 143 Ariz. 142, 161, 692 P.2d 991, 1010 (1984), *cert. denied*, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 864 (1985). "Pecuniary consideration must be a cause of the murder, not merely a result." *State v. Libberton*, 141 Ariz. 132, 139, 685 P.2d 1284, 1291 (1984). Thus, "an unexpected or accidental death that was *not in furtherance of the defendant's goal of pecuniary gain, which occurs during the course of or flight from a robbery*, does not in itself provide a sufficient basis for finding the aggravating circumstance." *State v. Hensley*, 142 Ariz. 598, 603–04, 691 P.2d 689, 694–95 (emphasis added) (quoting *State v. Harding*, 137 Ariz. 278, 296–97, 670 P.2d 383, 394–95 (1983), *later appeal*, 141 Ariz. 492, 687 P.2d 1247, *cert. denied*, 465 U.S. 1013, 104 S.Ct. 1017, 79 L.Ed.2d 246 (1984)). *Accord State v. Nash*, 143 Ariz. 392, 405, 694 P.2d 222, 235, *cert. denied*, 471 U.S. 1143, 105 S.Ct. 2689, 86 L.Ed.2d 706 (1985). Evidence of pecuniary gain must be shown beyond a reasonable doubt. *State v. Jordan*, 126 Ariz. 283, 286, 614 P.2d 825, 828, *cert. denied*, 449 U.S. 986, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980).

In making this determination, we should not, however, ignore the reason for defendant's presence at the scene of the crime. When the defendant comes to rob, the defendant expects pecuniary gain and this desire infects all other conduct of the defendant.

The following cases are helpful in demonstrating the expectation of pecuniary gain:

State v. Smith, 146 Ariz. 491, 501–03, 707 P.2d 289, 299–301 (1985) ("defendant committed the murder solely for the purpose of gaining access to the cash register, which was under the victim's control"; "the commission of the killing necessarily carried with it the expectation of pecuniary gain").

State v. Correll, 148 Ariz. 468, 479, 715 P.2d 721, 732 (1986) (defendant robbed home of victims, then took victims to desert where he shot and killed them; held that defendant "very carefully executed the armed robbery and the murders were part of the scheme of the robbery").

State v. Hensley, 142 Ariz. 598, 604, 691 P.2d 689, 694 (1984) (during robbery of bar, defendant forced victims to lie on floor and, in order that no witnesses be left to identify the robbers, defendant shot each execution style; "the murders were a part of the overall scheme of the robbery with the specific purpose to facilitate the robbers escape").

State v. Harding, 141 Ariz. 492, 500, 687 P.2d 1247, 1255 (1984) (robbery victim who was bound and gagged by defendant died of asphyxiation; "the purpose for binding and gagging ... was to facilitate the robbery and hinder detection"), *cert. denied*, 465 U.S. 1013, 104 S.Ct. 1017, 79 L.Ed.2d 246 (1984).

State v. Harding, 137 Ariz. 278, 294, 670 P.2d 383, 399 (1983) (defendant robbed, bound and gagged victims who he shot; murders committed "in the course of obtaining valuable personal property from ... victims").

Contra see State v. Gillies, 135 Ariz. 500, 512, 662 P.2d 1007, 1018–19 (1983) (defendant confessed that purpose of murdering rape victim was to eliminate her, not to steal her credit cards and cash; therefore, "Without some tangible evidence, it is not for the sentencing court to conclude that because money and items were taken, the purpose of the murder was pecuniary gain."), *later ap-*

peal, 142 Ariz. 564, 691 P.2d 655 (1984), *cert. denied,* 470 U.S. 1059, 105 S.Ct. 1775, 84 L.Ed.2d 834 (1985).

[16] We do not believe the defendant must intend beforehand to kill as well as to rob to satisfy the statute. A.R.S. § 13–703(F)(5). Nor do we believe that an absence of actual receipt of money or valuables negates a finding of expectation of pecuniary gain as an aggravating circumstance.

[17] In this case, the attempted robbery permeated the entire conduct of the defendant. The defendant may have reacted irrationally to the failure or inability of the victim to open the safe but the murder was neither accidental nor unexpected. The reason defendant was there was his expectation of pecuniary gain and the reason he stabbed the victim was because the victim was unable to open the safe, frustrating defendant's continuing attempt for pecuniary gain. The defendant's goal of pecuniary gain caused the murder and the murder was in furtherance of his goal. We agree with the trial court's finding that the defendant's expectation of pecuniary gain was an aggravating factor.[5]

C. Cruel, Heinous or Depraved

[18] Appellant challenges the trial court's finding that Hartsock's murder was committed in an especially cruel, heinous or depraved manner under A.R.S. § 13–703(F)(6). We consider the elements separately, as the statute is disjunctively phrased.

"Cruelty has been defined as the pain and distress suffered by a victim before death. To support a finding of cruelty, evidence of the suffering or pain experienced by the victim must be apparent." *State v. Wallace,* 151 Ariz. 362, 367, 728 P.2d 232, 237 (1986) (citations omitted). The requisite pain and distress can be either physical or mental. *State v. Gretzler,* 135 Ariz. 42, 51, 659 P.2d 1, 10 (1983).

Evidence abounds in this case indicating that Hartsock suffered mental and physical anguish. He was bound and gagged, called a liar, and threatened with death more than once. He had a letter opener placed against his throat. He received twenty-four stab wounds of which only five would have immediately killed him. Thus we can reasonably assume that the victim did not die instantly but rather suffered some physical torment prior to dying. We do not hesitate to conclude that Hartsock's murder was committed in an especially cruel manner.

"[S]tatutory concepts of heinous and depraved involve a killer's vile state of mind at the time of the murder, as evidenced by the killer's actions." *State v. Gretzler,* 135 Ariz. at 51, 659 P.2d at 10. Specific factors leading to a finding of heinousness or depravity include the apparent relishing of the murder by the killer, infliction of gratuitous violence on the victim, needless mutilation of the victim, senselessness of the crime, and helplessness of the victim. *Id.* at 52, 659 P.2d at 11.

The second, third, and fifth factors are present here.[6] To stab a bound and gagged man two dozen times clearly constitutes gratuitous violence on and needless mutilation of a helpless victim. Only a heinous and depraved state of mind would cause one person to treat another person with such callous disregard for human worth. The trial court did not err in concluding that Hartsock was killed in a heinous or depraved manner.

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[5] I respectfully dissent from this section of the opinion, which expresses the view of the majority of the Court. I agree with the majority's statement of the law, as it reiterates my belief that pecuniary gain must be the cause of the murder and that the murder must be in furtherance of the goal of pecuniary gain. *See State v. Harding,* 137 Ariz. 278, 296–97, 670 P.2d 383, 401–02 (1983) (Gordon, V.C.J., specially concurring). However, I disagree that pecuniary desires necessarily caused Hartsock's murder merely because the LaGrands intended to rob the bank. Nor do I agree that Hartsock's murder furthered any pecuniary desires. Hartsock's death provided the LaGrands with neither access to nor escape with money or other valuables. Finally, I not believe that evidence proves beyond a reasonable doubt that pecuniary desires motivated Hartsock's murder. My review of the record suggests that it is equally, if not more, likely that the panic caused by Hartsock's kick to Karl's leg, rather than pecuniary desires, motivated the LaGrands to kill Hartsock.

Because I would strike one of the trial judge's aggravating circumstances and mitigating circumstances exist, I would remand for resentencing. *See State v. Wallace,* 151 Ariz. 362, 728 P.2d 232 (1986); *State v. Gillies,* 135 Ariz. 500, 662 P.2d 1007 (1983).

[6] Not all five factors need be present. "The mere existence of senselessness or helplessness of the victim, in isolation, need not always lead

[19] The trial court found no mitigating circumstances sufficient to outweigh aggravating circumstances. The trial judge considered defendants' ages (Walter was 19 and Karl was 18 at the time of the killing), their prior home lives, and their remorse. We are obligated to consider "any relevant mitigating evidence." *Skipper v. South Carolina*, — U.S. —, —, 106 S.Ct. 1669, 1671, 90 L.Ed.2d 1 (1986) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 114, 102 S.Ct. 869, 876–77, 71 L.Ed.2d 1 (1982)). In addition to noting defendants' relatively young ages,[7] we have reviewed histories of their upbringing, transcripts of oral and written statements of remorse, and evidence that defendants may have killed Hartsock out of fear and surprise rather than as part of a calculated scheme. Given the especially cruel, heinous, and depraved nature of defendants' conduct, however, we conclude that these mitigating factors do not outweigh the existing aggravating circumstances and thus do not warrant leniency.

D. Proportionality Review

[20] Our purpose in conducting a proportionality review is to determine "whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *State v. Wallace*, 151 Ariz. 362, 728 P.2d 232 (1986) (quoting *State v. Richmond*, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1983)). We have considered cases involving multiple aggravating circumstances and no mitigating circumstances justifying leniency; *see, e.g., State v. Martinez-Villareal*, 145 Ariz. 441, 702 P.2d 670 (1985); *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1983); *State v. Vickers*, 129 Ariz. 506, 633 P.2d 315 (1981); *State v. Clark*, 126 Ariz. 428, 616 P.2d 888 (1980); cases where mitigating circumstances included an unpleasant childhood, *see, e.g., State v. Gretzler, supra; State v. Clark, supra;* and cases where mitigating circumstances included the defendant's age, *see, e.g., State v. Valencia*, 132 Ariz. 248, 645 P.2d 239 (1982); *State v. Vickers, supra; State v. Watson*, 129 Ariz. 60, 628 P.2d 943 (1981); *State v. Clark, supra.* Based on our review of these decisions, we conclude imposition of the death penalty in this case is proportional to sentences imposed in similar cases.

E. *Enmund* Claim

[21] Defendant challenges imposition of the death penalty on grounds that the trial court failed to make a finding in conformity with *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). In *Enmund*, the Supreme Court ruled that the Eighth Amendment forbids imposition of the death penalty on one "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Id.* at 797, 102 S.Ct. at 3376. An *Enmund* determination can be made by a jury, trial judge or appellate court. *Cabana v. Bullock*, — U.S. —, —, 106 S.Ct. 689, 697, 88 L.Ed.2d 704 (1986). The trial judge satisfied *Enmund* when he concluded "beyond a reasonable doubt that both defendants participated in the actual killing of Mr. Hartsock and that both defendants intended to kill him." R.T., December 14, 1984, at 14.

CONCLUSION

Appellant's convictions and sentences are affirmed.

HAYS, J. (Retired), CAMERON and HOLOHAN, JJ., concur.

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to a holding that the crime is heinous or depraved, however." *State v. Gretzler*, 135 Ariz. at 52–53, 659 P.2d at 11–12.

[7] A.R.S. § 13–703(G)(5) specifically lists the defendant's age as a mitigating factor. *See also Eddings v. Oklahoma*, 455 U.S. 104, 116, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982) (minor's age is a "relevant mitigating factor of great weight"); *State v. Valencia*, 132 Ariz. 248, 250, 645 P.2d 239, 241 (1982) (age "is a substantial and relevant factor which must be given great weight").

FELDMAN, Justice, concurring

I concur in the decision and in the court's analysis, except that portion pertaining to the aggravating circumstance involving pecuniary gain. 153 Ariz. at 36, 734 P.2d at 578. With respect to that portion of the opinion, I join in the views expressed by Chief Justice Gordon in footnote 5, at 36, 734 P.2d at 578.

153 Ariz. 38

Leta Fay FORD, a single woman, Plaintiff-Appellee,

v.

REVLON, INC., Defendant-Appellant.

No. CV 86-0148-PR.

Supreme Court of Arizona,
In Banc.

Feb. 24, 1987.

Reconsideration Denied April 21, 1987.

Employee brought action against manager of corporation and corporation for assault and battery and intentional infliction of emotional distress. The Superior Court, Maricopa County, Cause No. C-457854, Thomas W. O'Toole, J., entered judgment against manager for assault and battery, but not for intentional infliction of emotional distress and against corporation for intentional infliction of emotional distress, but not for assault and battery and corporation appealed. The Court of Appeals reversed and review was sought. The Supreme Court, Cameron, J., held that: (1) corporation's failure to take appropriate action in response to employee's complaint of sexual harassment by manager constituted tort of intentional infliction of emotional distress, and (2) employee's claims against manager for assault and battery and against corporation for intentional infliction of emotional distress were not controlled by workers' compensation laws.

Decision of Court of Appeals vacated, judgment of trial court reinstated.

Feldman, V.C.J., concurred and filed opinion in which Holohan, J., joined.

1. Master and Servant 🔑300, 304

When master's liability is based solely on negligence of his servant, judgment in favor of servant is judgment in favor of master, but when negligence of master is independent of negligence of servant, master may be liable, apart from his derivative liability for servant's wrongful acts.

2. Damages 🔑50.10

Corporation's failure to investigate employee's complaint of sexual harassment by corporation manager was independent of manager's abusive treatment of employee, and thus corporation could be liable for intentional infliction of emotional distress even though underlying harassment by manager did not arise to level of intentional infliction of emotional distress.

3. Damages 🔑50.10

Three required elements of tort of intentional infliction of emotional distress are: conduct of defendant must be extreme and outrageous; defendant must either intend to cause emotional distress or recklessly disregard near certainty that such distress will result from misconduct; and severe emotional distress must indeed occur as a result of defendant's conduct.

4. Damages 🔑50.10

Corporation's failure to promptly investigate and take action in response to employee's complaints of sexual harassment by corporation's manager constituted tort of intentional infliction of emotional distress where corporation acted outrageously in ignoring employee's situation, dragging out matter for months and leaving employee without redress, where corporation's reckless disregard of manager's conduct made it nearly certain that such emotional distress would in fact occur, and where ample evidence, both medical and otherwise established that emotional distress did occur.

Annex MG 4

SUPREME COURT OF ARIZONA STATE V. *(KARL) LAGRAND*
(30 JANUARY 1987).
SOURCE: 733 *PACIFIC REPORTER*, PP. 1066-1073

152 Ariz. 483

STATE of Arizona, Appellee,

v.

Karl Hinze LaGRAND, Appellant.

No. 6456.

Supreme Court of Arizona.

Jan. 30, 1987.

Defendant was convicted before the Superior Court, Pima County, No. CR-07426, J. Richard Hannah, J., of murder in the first degree, attempted murder in the first degree, attempted armed robbery, and two counts of kidnapping, and he appealed. The Supreme Court, Gordon, C.J., held that: (1) counsel's representation of defendant was not ineffective; (2) motion to substitute counsel was properly denied; and (3) defendant's waiver of jury trial on prior convictions was valid.

Affirmed.

Gordon, C.J., dissented in part with statement joined by Feldman, V.C.J.

1. Criminal Law ⇐641.13(1)

When deciding ineffectiveness of assistance claims Supreme Court need not analyze prongs of applicable *Strickland* test in any particular order.

2. Criminal Law ⇐641.13(2)

Counsel's decision not to pursue an insanity defense was not unreasonable, where counsel decided against pursuing a mental incompetency hearing only after interviewing defendant's psychologist three times; moreover, not pursuing an insanity defense precluded opening defendant's juvenile record to inspection and exposing all prior relevant conduct from his past to scrutiny. 17 A.R.S. Rules Crim.Proc., Rule 11.1 et seq.

3. Criminal Law ⇐641.13(1), 1163(2)

Trial counsel must be more than a neutral observer; he must subject State's case to meaningful adversarial testing; when counsel's acts and decisions approach those of a neutral trial observer, Supreme Court will presume prejudice.

4. Criminal Law ⇐641.13(2)

Although trial counsel kept an exceedingly low profile, it could not be said that his performance was so deficient as to compromise adversarial nature of trial; counsel's only realistic hope was to prevent finding of first-degree murder, and to that end he argued impulsivity in his closing remarks and during sentencing; failure to cross-examine most witnesses was not deficient because codefendant's counsel did an excellent job of cross-examining them.

5. Criminal Law ⇐641.13(7)

Although counsel could have presented defendant's case at aggravation-mitigation hearing more fully and skillfully, his performance did not fall below minimum threshold of professional skill established by case law; counsel did question psychiatrist concerning premeditation and extensively developed depressing nature of defendant's background.

6. Criminal Law ⇐641.1, 641.4(1), 641.10(1)

Defendant is constitutionally entitled to representation by counsel or to proceed without counsel if he so chooses; however, defendant is not entitled to any particular counsel, only to competent counsel. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇐641.10(2)

Request for new counsel should be examined with rights and interest of defendant in mind tempered by exigencies of judicial economy.

8. Criminal Law ⇐641.10(2)

Factors to be considered by trial judge on motion to substitute counsel include: whether irreconcilable conflict exists between counsel and accused, and whether new counsel would be confronted with same conflict; timing of the motion; inconvenience to witnesses; time period already elapsed between alleged offense and trial; proclivity of defendant to change counsel; and quality of counsel.

9. Criminal Law ⇐1152(1)

Trial court's decision on motion to substitute counsel will not be disturbed absent clear abuse of discretion.

10. Criminal Law ⇐641.10(2)

Motion to substitute counsel was properly denied, where trial had already been postponed numerous times and by time of motion nearly two years had past, and counsel had already been changed once; moreover, no real conflict between defendant and counsel was discernible from the record; it simply appeared that defendant would have been happier with other counsel.

11. Criminal Law ⇐770(2)

Party is entitled to instruction on any theory reasonably supported by evidence.

12. Criminal Law ⇐774

An intoxication instruction should be given only when the record supports such instruction.

13. Criminal Law ⇐774

Record did not indicate that intoxication instruction was justified, where testimony indicated only that defendants drank beer and whiskey the day before the crimes, and that on night before they had had a small party where beer and pizza were consumed and marijuana was smoked; moreover, neither defendant nor his accomplice showed any signs of intoxication at bank where critical events occurred.

14. Criminal Law ⇐1203.6

Although defendant can make a valid waiver of right to jury trial on issue of prior convictions even though not apprised of the fact that conviction on allegation of prior convictions can be used to enhance punishment and perhaps even trigger death penalty, better rule, particularly in capital cases, is to inform defendant of potential for enhanced punishment once convicted of priors. 17 A.R.S. Rules Crim.Proc., Rule 18.1(b).

15. Criminal Law ⇐1203.19

Defendant's waiver of his right to a jury trial on issue of prior convictions was valid, notwithstanding his claim that he was not apprised of fact that conviction of prior convictions could be used to enhance punishment and perhaps even trigger death penalty, where trial court informed defendant that conviction "has the effect of increasing punishment which is imposed." 17 A.R.S. Rules Crim.Proc., Rule 18.1(b).

16. Criminal Law ⇐1134(3)

Purpose in conducting a proportionality review is to ensure that death sentence is not excessive or disproportionate to penalty imposed in similar cases; purpose can be accomplished by examining cases in which Supreme Court affirmed or reversed a defendant's life sentence or affirmed or reversed a defendant's death sentence; review does not require examination of particular types of cases; all that is required is examination of "similar" cases.

Robert K. Corbin, Atty. Gen., William J. Schafer, III, Chief Counsel, Criminal Div., Diane M. Ramsey, Gary A. Fadell, Asst. Attys. Gen., Phoenix, for appellee.

Karp, Stolkin & Weiss, P.C. by Stephen M. Weiss, Elizabeth F. Claiborne, Tucson, for appellant.

GORDON, Chief Justice.

On February 17, 1984, appellant Karl LaGrand and his half-brother, Walter LaGrand, were convicted by a jury of murder in the first degree; attempted murder in the first degree; attempted armed robbery; and two counts of kidnapping. The brothers were sentenced to death for the first degree murder and to concurrent terms of years for the other charges. Both brothers challenge their convictions and sentences; however, their appeals have not been consolidated and we address issues raised by each in separate opinions. We have jurisdiction to hear Karl LaGrand's appeal pursuant to Ariz. Const. art. 6, § 5(3) and A.R.S. §§ 13-4031 and -4033.

Facts of the case are set out in *State v. LaGrand (Walter)*, 153 Ariz. 21, 734 P.2d 563 (1987). Additional facts necessary to resolve Karl's claims are adduced below.

ARGUMENT

Although Karl and Walter did not consolidate their cases for appeal, Karl adopts by reference arguments II–V raised by his brother: refusal to give a lesser included offense instruction regarding felony murder; admission of gruesome photographs; excuse for cause of a juror with scruples against the death penalty; and denial of a change of venue. These arguments were explored at length and rejected in *State v. LaGrand (Walter)*, *supra*, and for identical reasons are rejected here. Appellant does, however, raise additional arguments concerning (1) ineffective assistance of counsel, (2) failure to grant substitution of counsel, (3) failure to give an intoxication instruction, (4) improper waiver of a jury regarding the allegation of prior convictions, and (5) problems with the constitutionality and application of the death penalty. Each is analyzed below.

INEFFECTIVE ASSISTANCE OF COUNSEL

[1] Appellant argues that trial counsel was ineffective before, during and after trial. The test for ineffectiveness of counsel is now well established: the defendant must prove that counsel's representation was not reasonable under all the circumstances, i.e., that it was deficient, and that counsel's deficient performance prejudiced the defendant. *State v. Rossi*, 146 Ariz. 359, 364, 706 P.2d 371, 376 (1985); *see State v. Nash*, 143 Ariz. 392, 397, 694 P.2d 222, 227, *cert. denied*, 471 U.S. 1143, 105 S.Ct. 2689, 86 L.Ed.2d 706 (1985). When deciding ineffectiveness of assistance claims we need not analyze the prongs of the test in any particular order. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). The defendant must prove both elements of ineffectiveness; lack of proof on either element will defeat the claim. *Id.*

Because Arizona's test for ineffectiveness is modeled after the United States Supreme Court's test fashioned in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *see, e.g., State v. Salazar*, 146 Ariz. at 541, 707 P.2d at 945, *Strickland* is particularly helpful in defining the minimal competence level required by counsel. Proof of deficient performance "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 686, 104 S.Ct. at 2064. We must determine "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S.Ct. at 2064.

A.

[2] Appellant first argues that trial counsel's failure to pursue a Rule 11 mental incompetency motion prior to trial was deficient. However, counsel decided against pursuing a Rule 11 hearing only after interviewing Karl's psychologist three times. Also, not pursuing an insanity defense precluded opening Karl's juvenile record to inspection and exposing "all prior relevant conduct" from his past to scrutiny. *State v. Rodriguez*, 126 Ariz. 28, 31, 612 P.2d 484, 487 (1980). Further, no evidence of *M'Naughten* insanity existed. Counsel's decision not to pursue an insanity defense was not unreasonable.

B.

[3] Appellant also asserts that counsel's trial tactics were deficient. Appellant points out that his counsel waived an opening statement, cross-examined few witnesses, and failed to actively participate in the trial. Trial counsel must be more than a neutral observer; he must subject the state's case to meaningful adversarial testing. *United States v. Cronic*, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047, 80 L.Ed.2d 657 (1984); *State v. Nash*, 143 Ariz. at 399, 694 P.2d at 229. When counsel's acts and

decisions approach those of a neutral trial observer, we will presume prejudice. *Id.*

[4] Although trial counsel here kept an exceedingly low profile, we cannot say that his performance was so deficient as to compromise the adversarial nature of the trial. Counsel's only realistic hope was to prevent a finding of first degree murder, and to that end he argued impulsivity in his closing remarks and during sentencing. Failure to cross-examine most witnesses was not deficient because co-defendant's counsel did an excellent job of cross-examining them. Counsel did cross-examine Dawn Lopez, and establish that Karl was kicked. While we normally expect to see more vigorous representation from counsel, particularly in a death penalty case, we cannot say that counsel's trial performance was ineffective.

C.

[5] Finally, appellant argues that counsel was ineffective at the aggravation-mitigation hearing by failing to present all available mitigating evidence. The gravamen of appellant's complaint is that counsel failed to adequately question a defense psychiatrist concerning Karl's propensity to react impulsively under stress,[1] and did not call Karl's psychologist as a witness, choosing instead merely to introduce his report. Counsel did, however, question the psychiatrist concerning premeditation and extensively developed the depressing nature of appellant's background.

Counsel could have presented the appellant's case more fully and skillfully. Nonetheless, the test for counsel's ineffectiveness is not whether a better job could have been done, but whether his performance fell below the minimum threshold of professional skill established by case law. We hold that counsel's representation of appellant was not ineffective.

SUBSTITUTION OF COUNSEL

In December 1983, appellant filed a *pro se* motion to remove his counsel. No hearing was held on this motion until January 30, 1984, the day before trial, at which time appellant's counsel moved to withdraw as attorney of record. The judge inquired into reasons behind the "Conflict of Interest Between Attorney and Client" asserted by appellant. Appellant complained that his attorney had visited him only three or four times prior to trial, he believed that his attorney was not prepared for trial because he had not told his attorney everything he felt his attorney should know, he had not received copies of all motions filed by his attorney, and his attorney told him that "[he] was going to get found guilty no matter what" and "[he] can't get no plea bargain because of public pressure." The proposed substitution of counsel was denied.

[6-9] A defendant is constitutionally entitled to representation by counsel or to proceed without counsel if he so chooses. *Faretta v. California*, 422 U.S. 806, 807, 95 S.Ct. 2525, 2527, 45 L.Ed.2d 562 (1975); *State v. DeNistor*, 143 Ariz. 407, 412, 694 P.2d 237, 242 (1985); Ariz. Const. art. 2, § 24; *see Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). However, a defendant is not entitled to any *particular* counsel, only to competent counsel. *State v. DeLuna*, 110 Ariz. 497, 500, 520 P.2d 1121, 1124 (1974). Thus a request for new counsel should be examined with the rights and interest of the defendant in mind tempered by exigencies of judicial economy. We have identified several factors to be considered by the trial judge: whether an irreconcilable conflict exists between counsel and the accused, and whether new counsel would be confronted with the same conflict; the timing of the motion; inconvenience to witnesses; the time period already elapsed between the alleged offense and trial; the proclivity of the defendant to change counsel; and

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[1] Appellant's premise that the psychiatrist would have testified favorably on appellant's propensity to act impulsively is based on written statements recorded by the psychiatrist after examining appellant. Appellant's Opening Brief at 21.

quality of counsel. *See State v. Lee*, 142 Ariz. 210, 220, 689 P.2d 153, 163 (1984); *State v. DeNistor*, 143 Ariz. at 413, 694 P.2d at 243. The trial court's decision will not be disturbed absent a clear abuse of discretion. *State v. Lee*, 142 Ariz. at 220, 689 P.2d at 163.

[10] The trial court did not abuse its discretion. The trial had already been postponed numerous times and by the time of the motion nearly two years had passed. Substitution of counsel would have caused yet more delay. In addition, counsel had already been changed once. No real conflict between the appellant and counsel is discernible from the record; it simply appears that appellant would have been happier with other counsel. Finally, the judge commended counsel for "working very energetically and diligently on his client's behalf." The motion was properly denied.

INTOXICATION INSTRUCTION

[11, 12] Appellant contends that evidence was sufficient to mandate giving an intoxication instruction to the jury, which could have negated the culpable mental state necessary for premeditated first degree murder. A party is entitled to an instruction on any theory reasonably supported by evidence. *State v. Shumway*, 137 Ariz. 585, 588, 672 P.2d 929, 932 (1983). An intoxication instruction should be given only when the record supports such an instruction. *State v. Cruz-Mata*, 138 Ariz. 370, 373–74, 674 P.2d 1368, 1371–72 (1983).

[13] The record does not indicate that an intoxication instruction was justified. Testimony indicated that the LaGrands drank beer and whiskey the day before the crimes and that the night before the crimes they had a small party where beer and pizza were consumed and marijuana was smoked. Karen Libby testified that several days prior to the crimes she and Karl "tripped" together on acid "on a few occasions". However, on redirect examination Libby admitted that she could not tell whether Walter and Karl were intoxicated the morning of the crimes. Also, neither appellant nor Walter showed any signs of intoxication at the bank where the critical events occurred. Denial of an intoxication instruction was not error.

WAIVER OF JURY TRIAL ON PRIOR CONVICTIONS

On March 15, 1984, the trial court conducted a hearing to determine whether appellant was knowingly, voluntarily and intelligently waiving his right to a jury trial on the issue of prior convictions. 17 A.R.S. Rules of Crim.Pro., Rule 18.1(b). The trial court concluded that appellant's waiver was knowing, voluntary and intelligent. Appellant challenges that conclusion. The sole issue we need to decide is whether appellant's waiver was valid.[2]

Waiver of a constitutional right is a matter of grave concern. Our jurisprudence has long recognized that a constitutional waiver is not valid unless the defendant manifests "an *intentional* relinquishment or abandonment of a *known* right or privilege." *Montano v. Superior Court*, 149 Ariz. 385, 392, 719 P.2d 271, 278 (1986) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938) (emphasis added)). Thus Rule 18.1(b)(1) requires that before the judge may accept a waiver of a jury trial he must address the defendant personally and advise him of his rights. Moreover, a waiver may be made only in writing or in open court. Rule 18.1(b)(2). In this case the waiver was made in open court, so we may examine the record ourselves to determine if indeed the waiver was valid.

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[2] Appellant argues that his waiver was "meaningless" because the trial court could not have possibly reconstituted the original jury after a delay. However, we have never held that a defendant is entitled to a jury trial on prior convictions by the same jury that originally convicted him. The case cited by appellant, *State v. Brydges*, 134 Ariz. 59, 653 P.2d 707 (App.1982), merely holds that the jury which determines the existence or nonexistence of prior convictions must also determine whether they were "dangerous". Moreover, the delay in this case was attributable in part to defense counsel's own request for an accommodation of his schedule.

"THE COURT: ... The first thing I want to make sure of is that the defendant—when I say 'the defendant' this morning, I'm talking about Karl LaGrand, unless I say otherwise, since he's the only defendant that's involved in these proceedings this morning.

I want to ascertain that the defendant does waive his right to a trial by jury on the allegation of prior convictions.

Now, the defendant is not admitting the prior convictions. The County Attorney is going to be put to his proof; right?

MR. ALFRED [State's Counsel]: That's correct.

MR. GERSON [Defense Counsel]: Yes, Your Honor.

THE COURT: The only thing is that it will be determined by the Court after a non-jury trial rather than by a jury. Is that the way you intend to proceed?

MR. ALFRED: Yes, Your Honor.

THE COURT: Right?

MR. GERSON: Yes, Your Honor.

THE COURT: Well, I think under these circumstances, then Rule 18.1B needs to be complied with. That rule provides, 'The defendant may waive his right to trial by jury with consent of the prosecution and the Court,' and I have to determine that it's voluntary and knowing and intelligent, and I'm further required to ascertain that after advising the defendant of these rights.

So let me advise you right now of these things, Mr. LaGrand. You probably already know them, but as you can see, I'm required to personally tell you these things.

In the—in this case the County Attorney alleged that you had prior felony convictions, and if he succeeds in establishing that, it has the effect of increasing the punishment which is imposed.

You have the right to make the County Attorney prove that. You don't have to admit that. You have the right to make him prove it, and you also have the right to make him prove that to the satisfaction of a jury.

Now, your attorney indicated to myself and to the prosecutor at the conclusion of the trial before the jury that you wished to waive that determination by a jury; that is, not require that it be determined by a jury; is that correct?

MR. KARL LaGRAND: Yes, Your Honor.

THE COURT: All right. Is that still the way that you wish to proceed?

MR. KARL LaGRAND: Yes, sir.

THE COURT: You understand that in the absence of your waiving it—or agreeing to it, you would have the right to require that the prosecutor prove this to the jury by evidence produced here in the courtroom, and he would have to convince the jurors of that, all of them, beyond a reasonable doubt. He would have to do that by evidence produced in the courtroom, and you would have and you still have—indeed you have the full right to a trial on this issue, and you will get one here at this time. The only thing that is being given up is the right to have this determined by a jury. You understand?

MR. KARL LaGRAND: Yes.

THE COURT: You will have the right to put on any evidence that you might wish this morning. Your lawyer will have the right to cross-examine any witnesses that Mr. Alfred calls to the stand, but instead of his having to convince all of the jurors of the truth of these allegations of prior convictions and prove it to the jurors beyond a reasonable doubt, he'll have to prove it to me beyond a reasonable doubt. Do you understand that?

MR. KARL LaGRAND: Yes, Your Honor.

THE COURT: Has anyone promised you anything to get you to give up your right to a trial by jury on this matter?

(Discussion held off the record between Karl LaGrand and Mr. Gerson.)

MR. KARL LaGRAND: No, Your Honor.

> THE COURT: Has anyone threatened you to get you to do this or promised you anything to get you to do this?
>
> MR. KARL LaGRAND: No, Your Honor.
>
> THE COURT: It has to be your own, free, voluntary choice and decision. Is it?
>
> MR. KARL LaGRAND: Yes, Your Honor.
>
> THE COURT: You understand this right that you have, to have it determined by a jury?
>
> MR. KARL LaGRAND: Yes, Your Honor.
>
> THE COURT: Is there anything else that you think I should advise the defendant?
>
> MR. ALFRED: I think you've covered it, Your Honor.
>
> THE COURT: Mr. Gerson?
>
> MR. GERSON: I can't think of anything, Your Honor.
>
> THE COURT: All right. It's my finding that the proposed waiver of jury trial on the allegation of prior convictions is knowing, voluntary and intelligent.
>
> And you wish to consent to this waiver, Mr. Alfred?
>
> MR. ALFRED: Yes, Your Honor.
>
> THE COURT: And this is how you wish to proceed, too, Mr. Gerson?
>
> MR. GERSON: Yes, Your Honor.
>
> THE COURT: All right. It's ordered that the waiver be approved."

R.T., March 15, 1984, at 2-6. We agree with the trial court that the waiver was knowing, voluntary and intelligent.

The appellant also urges that *no* defendant can make a truly valid waiver unless apprised of the fact that conviction on the allegation of prior convictions can be used to enhance punishment and perhaps even trigger the death penalty. We recently rejected this argument in *State v. Hooper*, 145 Ariz. 538, 703 P.2d 482 (1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 834, 88 L.Ed.2d 805 (1986), wherein we held that trial courts have no obligation to inform defendants that a finding of prior convictions may enhance punishment. Such knowledge has no bearing on the narrow issue of trial by judge or jury since the waiver has no effect on enhancement. *Id.* at 548-49, 703 P.2d at 492-93.

[14] However, we believe that the better rule, particularly in capital cases, is to inform the defendant of the potential for enhanced punishment once convicted of priors. Knowledge of the ultimate consequence of the decision surely will aid defendants in making a truly knowing and intelligent choice, as contemplated by the Constitution and Rules of Criminal Procedure, with a minimal sacrifice of judicial time.

[15] Here the trial court informed appellant that conviction "has the effect of increasing the punishment which is imposed." The judge had no obligation to be more explicit. A defendant need only know that conviction on priors enhances his punishment in order to make an informed choice. Accordingly, we find that appellant's waiver was valid.

DEATH PENALTY

Appellant raises three death penalty issues. He first argues that specific findings on aggravating and mitigating circumstances were erroneous. We addressed this issue in *State v. LaGrand (Walter)*, 153 Ariz. 21, 734 P.2d 563 (No. 6457, 1987), and analysis therein applies here.[3] In addition, appellant's argument that the aggravating circumstance of a prior conviction involving the use or threat of violence was not proven beyond reasonable doubt is premised on the waiver argument rejected earlier.

[16] Appellant next argues that comparing the present case only to cases in which the death penalty was imposed rath-

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[3] I respectfully dissent from this section of the opinion, which expresses the view of the majority of the Court. I would strike the aggravating circumstance of pecuniary gain as found by the trial court and would remand for resentencing for reasons articulated in *State v. LaGrand (Walter)*, at 36 n. 5; 734 P.2d at 578 n. 5.

er than comparing the facts and the defendant to homicide cases in which the death penalty was not imposed precludes a true proportionality review. We disagree. Our purpose in conducting a proportionality review is to ensure that the death sentence is not excessive or disproportionate to the penalty imposed in similar cases. *See State v. LaGrand (Walter)*, at 21, 734 P.2d 563. This purpose can be accomplished by examining cases in which we affirmed or reversed a defendant's life sentence or affirmed or reversed a defendant's death sentence. We decline to hold, however, that a "true" proportionality review requires examination of particular types of cases. All that is required is an examination of "similar" cases.

Finally, appellant argues that failure to require a sentencing judge to find that aggravating circumstances outweigh mitigating circumstances beyond any reasonable doubt renders the death penalty statute in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution and corresponding provisions of the Arizona Constitution. Defense counsel concedes that this issue has been raised previously and rejected by this court. Therefore, we decline at this time to say anything more on the issue.

CONCLUSION

Appellant's convictions and sentences are affirmed.

Jack D.H. Hays (Retired), James Duke Cameron, William A. Holohan, JJ., concur.

FELDMAN, Vice Chief Justice, concurring.

I concur in the decision and in the court's analysis, except that portion pertaining to the aggravating circumstance involving pecuniary gain. 152 Ariz. at 489, 733 P.2d at 1072. With respect to that portion of the opinion, I join in the views expressed by Chief Justice Gordon in footnote 3, at 489, 733 P.2d at 1072.

Jack Randy HAWKINS and Cynthia Hawkins, husband and wife, Plaintiffs-Appellants,

v.

ALLSTATE INSURANCE COMPANY, a foreign corporation, and Does I through V, Defendant-Appellee.

No. CV-86-0010-PR.

Supreme Court of Arizona.

Feb. 26, 1987.

As Amended March 4, 1987.

Reconsideration Denied April 7, 1987.

Insureds brought action for bad faith against insurer as result of handling of claim for total loss of automobile. The Superior Court, Maricopa County, No. C-432754, David J. Perry, J., granted insurer's motion for judgment notwithstanding the verdict and, in the alternative, granted motion for new trial. The Court of Appeals reversed the grant of judgment n.o.v. and affirmed grant of new trial and petition for review was granted. The Supreme Court, Gordon, C.J., held that: (1) testimony of former claims examiner was relevant to issues of punitive damages and bad faith; (2) trial court abused its discretion by ordering new trial on basis that testimony could have been excluded because of its prejudice; (3) award of punitive damages was supported; and (4) Supreme Court holding that burden of proof on punitive damages as clear and convincing evidence is to be given only prospective application.

Decision of Court of Appeals vacated, verdict affirmed, and matter remanded.

Holohan, J., dissented and filed an opinion.

Annex MG 5

SUPERIOR COURT OF THE STATE OF ARIZONA, PIMA COUNTY,
THE STATE OF ARIZONA V. *WALTER AND KARL LAGRAND*,
TRANSCRIPT OF THE AGGRAVATION-MITIGATION HEARING
(17 SEPTEMBER 1984-12 DECEMBER 1984)

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA,
Plaintiff,
vs.
WALTER BURNHART LaGRAND and
KARL HINZE LaGRAND,
Defendants.

NO. CR-07426

BEFORE: THE HON. J. RICHARD HANNAH
Judge, Division 12

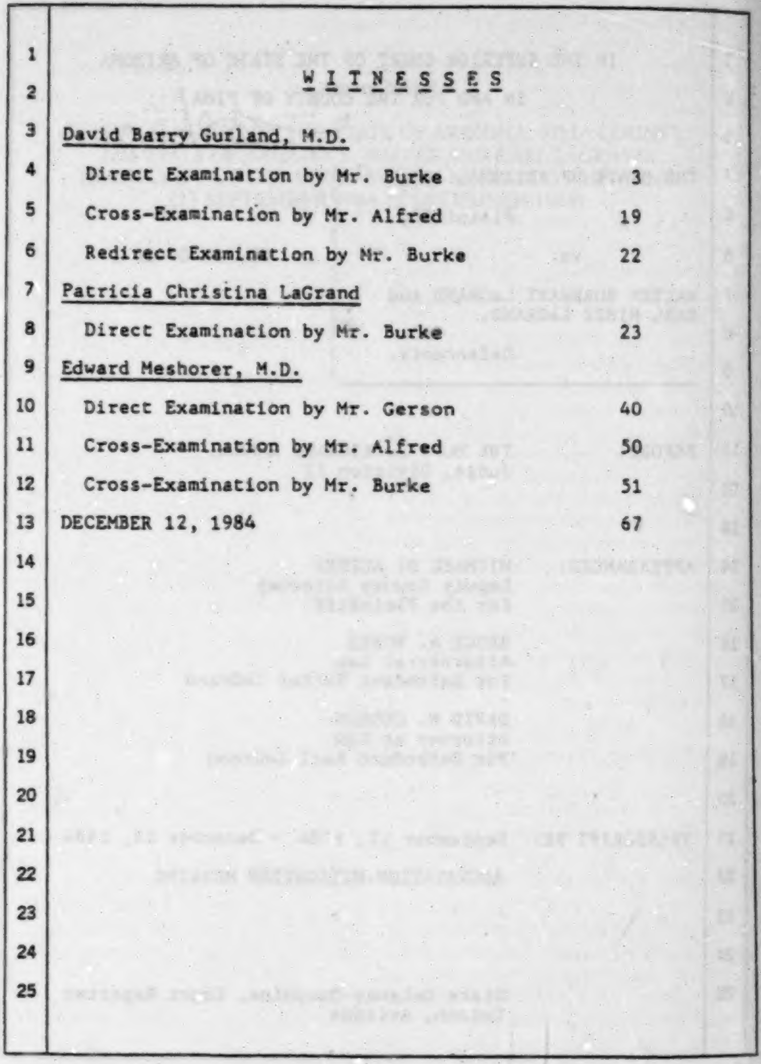
APPEARANCES: MICHAEL D. ALFRED
Deputy County Attorney
For the Plaintiff

BRUCE A. BURKE
Attorney at Law
For Defendant Walter LaGrand

DAVID M. GERSON
Attorney at Law
For Defendant Karl LaGrand

TRANSCRIPT RE: September 17, 1984 - December 12, 1984
AGGRAVATION-MITIGATION HEARING

Diane Delaney-Dauphine, Court Reporter
Tucson, Arizona



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THE COURT: This is the time set for the aggravation-mitigation hearing in State vs. LaGrand. I see that Mr. Burke has filed a motion entitled "Motion for Sanctions" which would have to do with the prosecutor's offering evidence or arguing, I guess, aggravating circumstances. You're prepared to put on some mitigating -- some evidence in mitigation, are you not?

MR. BURKE: Yes, Your Honor.

THE COURT: And are you also, Mr. Gerson?

MR. GERSON: Yes, Your Honor.

THE COURT: Well, if there's no objection, I suggest that you put on your evidence in mitigation, and then I'll take up the issue raised in the motion. That will perhaps expedite things, and at least that way it won't inconvenience your witnesses.

MR. BURKE: Thank you, Your Honor.

THE COURT: Is it all right to proceed like that?

MR. BURKE: We are prepared to go with testimony at this time.

MR. GERSON: That's fine, Your Honor.

THE COURT: All right. Now, I've got some other things here which were delivered to my office by -- I assume there's going to be some evidence surrounding them or whatever, so -- anyway, I've got them.

Go ahead, Mr. Burke.

MR. BURKE: Thank you, Your Honor. Bruce Burke on behalf of Walter LaGrand, who is present, Your Honor. At this time I would like to call Dr. Gurland to the stand on Mr. Walter LaGrand's behalf.

THE COURT: All right.

DAVID BARRY GURLAND, M.D.,

being first duly sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. BURKE:

Q Sir, would you please state your full name and occupation.

A Yes. David Barry Gurland, M.D. I'm a psychiatrist.

Q And could you please provide us with a brief resume of your professional experience and education.

A Surely. B.A. degree from Williams College, Williamstown, Massachusetts, 1961; M.D. from Boston University School of Medicine, graduating 1965; year of rotating internship Marion County General Hospital, Indianapolis, Indiana, finishing that in 1966; three years of residency Indiana University Medical Center, finishing as chief resident in 1969; two years at Davis-Monthan Air

Force Base as the base psychiatrist, finishing in 1971; going into private practice at that time, still in private practice; board certified in my specialty in April of 1973.

Q And suffice it to say you are licensed to practice medicine in the State of Arizona?

A That's correct.

Q Sir, do you do any court-related activities or work for Pima County or have you in the past?

A Yes, I have.

Q Could you just provide a brief summary, if you would, of those types of activities.

A I do Rule 11 examinations. I've been involved in custody cases, done civil work and personal-injury cases. So sort of a gamut of psychiatric involvement in legal matters.

Q And on these various occasions, I gather you would have testified in court; is that correct?

A On a number of them, yes.

Q In those proceedings, were you qualified as an expert?

A Yes, I was.

Q Sir, I believe I made a request of you some time ago now to interview and prepare for testimony regarding Walter LaGrand. Do you recall that?

A That's correct, yes.

Q Do you see him in the courtroom today?

A He's on your right.

Q And could you please tell us whether you saw him and, if so, on what occasions?

A I saw Walter on the 18th of October of 1983.

Q And where did that meeting take place?

A That was in my office at 4703 North First Avenue.

Q And how long did you meet with Mr. LaGrand on that date?

A I'd say somewheres around an hour's time.

Q Could you tell us, please, in summary form what you did during that meeting.

A I basically went through his past history, reviewed the incidents around the crime for which he's presently being sentenced, and basically also did a mental-status examination when I saw him.

Q Subsequent to meeting with Walter, did you have occasion to review any other documents or make any other preparation for your testimony here today?

A Yes. I had a chance to read some of his previous presentence evaluations with regards to social history and so forth.

Q And you confined your review of those documents to the social history problems?

A That's basically what -- all that I was really involved in, yes.

Q Based on your review, sir, I'm going to ask you some questions about your professional opinion regarding Mr. LaGrand and his activities. Let me start with your view, sir, of his childhood and upbringing as it might impact on his personality and behavior.

A Surely. Background history reveals he comes from pretty much a broken home, was born out of wedlock, was placed in the foster home-type settings early on until his mother married, and then had a home for a while, which broke up. There was a lot of acting-out on the part of both parents during the time that Walter was less than 12.

I think from age 12 on he was in and out of foster homes, in and out of juvenile-type settings, and probably the most stability he had in his life was when he was involved with some of the juvenile programs where they did attempt to help him with education and so forth. So basically not a very constructive early life style.

Q Now, you say he was born out of wedlock. Did he indicate to you whether he ever knew his father?

A As far as I know, he did not.

Q And do you know any background information on his father, his natural father?

A He was of Puerto Rican origin, was in the service in Germany -- and that's all I know -- where he met Walter's mother.

Q And to your knowledge, based on your investigation and work, he never, then, had any personal contact with his natural father?

A As far as I know, no.

Q Did he have any contact with a father of any kind?

A Yes. He had a stepfather who adopted all three of the LaGrand children, gave them his name, as a matter of fact.

Q And do you know any background or information on the adoptive father?

A Serviceman, black, who met Walter's mother in Germany when he was stationed there. He adopted the children, and he brought them out of some type of foster setting and did bring the children back to the States.

As I indicated, after that there was a lot of turmoil in the relationship, a lot of conflicts between mother and father, acting-out on both their parts. The father apparently went -- was restationed out of the States. When he came back, the parents agreed to divorce. That was the last somewhat stable male in Walter's household.

Q And when you say "acting-out," could you just give us some understanding of what you mean by that phrase.

A Sexual acting-out: infidelity, aggressive behavior towards each other at times; pretty much -- very disruptive household throughout rather formative years.

Q I believe the record would reflect that the divorce occurred between Mr. and Mrs. LaGrand in 1975; is that --

A It may have been that late, yes.

Q After that period of time, do you have any information on the social activities and history of Walter and the family?

A Walter would run away from home in an attempt to have authorities actually pick him up and place him, because the house was so disruptive. He was placed in various institutions, including VisionQuest and Arizona Boys Ranch and I think a couple of other DOC-type of facilities where he probably spent most of his early and middle adolescent years.

Q And what impressions or opinions did you reach regarding those middle years in terms of Walter's upbringing and care?

A When he was in some type of institutional setting where there were supportive people around, he seemed to do better, but then, for whatever reason, he'd be returned to his natural mother and all sorts of problems would occur again, and Walter would run away again or get himself in some difficulty which would get himself back into the system.

When I talked with Walter, he really talked fondly about a lot of the people in the correctional systems and in the schools that worked with him who at least took time and listened to him and tried to help him.

Q Do you have an opinion as to whether these institutionalizations actually did Walter any good?

A It seemed they did in that during those times there was very little, if any, acting-out on the part of Walter. He did try to work towards his education and did seem to handle himself around others much better.

Q Do you think that he stayed in those institutions long enough to obtain the maximum benefits from those programs?

A No. I think it was, unfortunately, very disruptive and very inconsistent. He bounced in and out of them, really, back to an environment that was not a very healthy one for him.

Q Now, I would like to go back for a few questions and deal with the relationship between Walter and his adoptive father, Mr. LaGrand.

Did you learn anything about that relationship, in particular father-and-son relationship, that you think has some bearing on these proceedings?

A Well, basically Walter did try to please his father and did try to be what he thought his father wanted him to be, but he got a lot of mixed messages, and there was a lot of physical abuse that went on --

Q Could you tell us what mixed messages you found in that relationship.

A Well, his father would say do this but his father would do something else. Rules were set up and were quite inconsistent.

Q Can you give us, looking back, any examples of the type of thing you're talking about?

A Things like, you know, be respectful and try to obey the rules and do the right thing, and yet the father would not be doing that nor would his mother be doing that, that type of thing.

Q You've also mentioned physical abuse. Could you tell us in greater detail what you're referring to on that subject.

A Walter referred to a number of significant beatings that he took over the years that were -- that did not seem to be consistent with what Walter had done but almost more at the whim or the feelings of the father rather than anything that Walter had to do. So, again, inconsistent. He might do something that was perhaps a minor transgression and get a pretty good beating for it that was way out of proportion for what he had done.

Q In your opinion, did any of these beatings become abusive or were they abusive?

A Most of them were abusive, excessive.

Q How would these factors affect -- these factors you've discussed here today, Doctor, affect Walter's development as a boy and as a young man?

A It sort of makes him the perfect delinquent, if you will, with regards to his environment. It sets up a total disregard for himself -- that he's basically no good -- and it sets up a disregard for others around him and rules and authority figures because they don't treat you right; they're not fair. He's -- he then becomes an accident looking for a place to happen.

Q Did you make any inquiry regarding his school performance during these years?

A Yes, we talked about that.

Q Would you tell us what you learned.

A Basically he was not a very good student. There were a lot of inconsistencies in his attendance and so forth, but when he was in the program where he could stick with it for a while, he did fairly well, and fairly

Karl was considerably
worse

well for Walter is probably C-average or low Cs. He's not an overly-bright young man, though he does try to do more at times than what he has and what he's capable of really doing.

Q Focusing for a minute on what Walter's social relations would have been with his peers, the people he was growing up with as children, do you have any information and opinions regarding that phase of Walter's life?

A He took a lot of ribbing from other kids around him. The family did not do well. He did not really handle school very well, and so he was ostracized a lot by his peer group. His wey of often handling it was to perhaps prove that he was -- could take care of himself, that type of thing, ways of trying to show at least in one area he could handle himself and try to quiet some of the remarks that were made by his peer group.

Q Are you indicating, Doctor, that he would respond by being a tough guy and take that attitude towards the situation?

A This would be his pose, yes.

Q How does that relate to Walter and his core of being, if you will, or what kind of a person he really is?

A Well, again, I only had a chance to meet him for an hour, but he certainly didn't seem like he was a very tough-guy character that he would tend to portray.

Q Is this a pose that Walter strikes?

A Yes. It wards other people off so they don't really get to know what's going on underneath him. That way he doesn't have to deal with his fears or uncertainties or let anybody else in, because he's found that when people know something about you they take advantage of you and they misuse it, or at least that was his experience.

Q I believe you indicated, Doctor, that you did a -- not only a mental history but drew some conclusions about his mental states and social attitudes, did you?

A Right.

Q Could you enumerate for us what your conclusions were on those subjects.

A Well, I think, as I said earlier, he's not an overly-bright young man. He probably falls in the dull-normal range of intelligence. He's very protective of others and I think especially of his family members that -- the siblings, feels he has sort of a role to live up to to take care of them since nobody else did.

He did not appear in any way psychotic to me during the time that I saw him. He certainly has an understanding of what are the acceptable values in society, right and wrong and so forth. He's basically a very frightened young man, a very insecure young man who will tend to come on with this bravado to just sort of keep his face up, if you will, or present himself in what he hopes will be a favorable light. But underneath he's -- basically he's pretty sensitive and he's a pretty scared guy.

Q You say he's protective of his siblings. Could you elaborate on what you mean by that.

A Well, that got into some of what we talked about with regard to the incidents and his relationship with his brother Karl.

Q What did you learn on those subjects?

A That he felt that he somehow should protect Karl and take care of him because as the older brother he was the one that should somehow be a stable influence in his life, or try to be, and -- or at least that's the role that he sees himself in and that he did make attempts to do that. In fact, he brought his brother into his home on several occasions, trying to provide a home for him, in a sense tried to keep his brother out of trouble. That didn't work. They both seemed to get themselves into trouble; and that for the most part he felt that the times he tried to take on whatever society was going to mete out with regards to his brother because he felt his brother deserved a better chance.

Q Now, did you talk at all about the incident in the bank on January 7, 1982?

A Yes, we did.

Q And what did you learn of that incident from Walter?

A Basically it was an act of desperation in that Walter had made attempts to try to find work prior to being in jail and had been unsuccessful at that. I think he tried for about six, seven months or something like that; felt that he really had little, if any, recourse in order to support his little family at that time.

He basically wanted to stay out of trouble but stated that prior to the incident, that his brother had, primarily, felt that maybe they could do something that would get them some money and provide them with perhaps a more decent life style, and this turned out to be the attempted bank robbery. It was basically a bungled operation from the beginning which turned into more and more of a disaster as the episode went on. They both became rather frightened and scared. Walter felt that he somehow should keep things under control.

He apparently -- he said he went out to survey the area to see whether they could get away because

I think they realized that there was not going to be any success in their attempt to rob the bank, and he said when he came back into the room it was a bloodbath at that point and that basically his brother had not been able to handle himself, had panicked and basically all hell had broken loose by the time he came back in, and by that time it was really beyond salvation, and all he did was get his brother out of there and try to get away.

Q Taking that information, the facts that Walter gave regarding the incident of January 7, 1982, and comparing that with what you know of his psychological and social make-up, was his conduct in that setting consistent with what you learned about Walter and his background?

A I felt it was, that this was a -- a way that he would have handled the situation; that he basically, again, would try to protect his brother and really would try to avoid problems, though it doesn't seem that's been what's happened in his life.

Q Do you have any opinion, Doctor, as to whether or not Walter was being truthful with you about what he was telling you?

A Yes, I have an opinion.

Q And how do you reach that conclusion?

A Well, we went over it several times. There was really nothing to be gained on Walter's part with regards to telling me what happened, and I thought he was, you know, trying to play it as straight with me as he could, and did.

Q Now, you say that he is protective of his brother Karl?

A Right.

Q What do you mean by that? How does it evidence itself?

A That he's going to try to take the brunt of things with regards to his brother; that he would try to keep his brother from getting into trouble or difficulties, try to lessen the problems that his brother would get into, again feeling that he was now the father-figure, if you will, and that was his job.

Q And when Walter then told you that it was his brother that did the stabbing in this situation, based on the fact that he would otherwise be protective of his brother, is that consistent with your picture of him?

A Yes. I think at the same time while being protective he was trying to tell it as it happened and what really went on and what his involvement was with it and how he handled himself during the situation.

Q Looking back on Walter's childhood and upbringing, how would he fit into the type of childhood that the general populace would have and how would you compare those two?

A It's much subpar. It's sort of a nightmare. I mean if you really wanted to set up all the elements that would create a disaster as far as an adult, I think Walter had all those ingredients in his childhood. The disruptions, the inconsistencies, the abuse, the lack of warmth, understanding, love, all those things, those elements were present in his upbringing. So he really had little of the nurturing that we like to thing of in regards to a productive environment.

Q And focusing on that lack of nurturing, I would gather from your testimony — correct me if I'm wrong — that we're talking about a period of years that is preteen and early teen; is that right?

A We're talking about the really formative years where one develops their identity, develops a goal towards a role in life, develops an ability to handle relationships. The basic tasks are accomplished during those years, so that we, hopefully, become constructive, productive adults, and those are the years when life was basically a great misfortune for Walter.

Q Is it correct, Doctor, that you're referring to environmental factors in Walter's life that were largely beyond his control as a small child and growing boy?

A As far as I know, he had no choice in what happened. He was the victim, if you will, of his environment as a child. He is not able to make decisions on his own or choose his own environment. When he did, he did try to get into more stable environments. He did this by running away and becoming a part of the juvenile system where he might get into a foster home that had more of what he needed than what he was being provided in his own home.

Q As I understand your testimony, then, Doctor, although the support was there for a time, those programs weren't consistently administered and as a result Walter was returned to that environment that essentially deprived him of those normal attributes in growing up?

A That's correct.

MR. BURKE: I have no more questions at this time, Your Honor.

CROSS-EXAMINATION

BY MR. ALFRED:

Q Dr. Gurland, I believe you said you saw Walter LaGrand on October 18th of 1983; is that correct?

A That's what I did say, but it was on the 2nd of November. I'm sorry.

Q Second of November.

A Right.

Q And you saw him for the period of one hour?

A Approximately that period of time, yes.

Q So that approximate one hour, has that been your sole contact with Walter LaGrand?

A That's correct, yes.

Q Have you ever had occasion to have contact with Karl LaGrand?

A No, I have not met with Karl LaGrand.

Q What was the context of your interview or the purpose of your interview with Walter LaGrand?

A The original context was to determine whether there indeed was any possibility for Rule 11 examination.

Q That was to determine whether or not he was competent to stand trial?

A Not so much that, but his mental state at or around the time of the incident was more of what was looked at or -- one of the questions his attorney had asked me to look at.

Q What was your -- what were your sources of information concerning Walter and his past and so forth?

A Other than Walter's history, some of the presentence evaluations that have been done with regards to background and background history which were consistent with what Walter told me.

Q So it was basically his prior presentence reports and then what he told you?

A That's correct.

Q Did you find -- I think you said you found Walter to be of average to slightly-below-average intelligence; is that correct?

A Correct. Yes.

Q And you also found that he demonstrated an attitude of protectiveness towards his brother Karl; is that right?

A That was very much a theme as we talked, yes.

Q Did you get the impression that the two of them had spent quite a bit of time together during the course of their lives?

A Intermittent. There were periods when they were separatedand together. I don't know exactly how much or how many years they spent together, but there appear to have been disruptions in that relationship.

Q Did you further get an impression of whether or not during the times that they were together and acting in concert together that Walter was the dominant personality between the two, or the leader?

A Dominant in the sense that he was the big brother and would often try to set the rules. In that sense I guess you could call him dominant, yes.

MR. ALFRED: Thank you. I think that's all I have.

REDIRECT EXAMINATION

BY MR. BURKE:

Q Doctor, did Walter LaGrand express to you either by word or actions any remorse or sorrow for what he was involved in?

A Very much so.

Q Can you tell us the particulars in that event.

A Well, that one individual had died who had a family and he seemed to be a person who had been a good person and of the lady who had been very badly frightened, terrorized and severely injured physically, and he had definite regrets that any of that had happened. It was certainly, as he said, not what had been intended at the time of the attempt to rob the bank.

MR. BURKE: Thank you, Doctor. I have no more questions.

MR. ALFRED: Nothing further.

THE COURT: All right. Thank you, Doctor.

MR. BURKE: At this time I would like to

call Patricia LaGrand.

PATRICIA CHRISTINA LaGRAND,

being first duly sworn, testified on her oath as follows:

DIRECT EXAMINATION

BY MR. BURKE:

Q Patricia, could you please state your full name and your age.

A Patricia Christina LaGrand; twenty-four.

Q And you are the oldest sister of Karl and Walter LaGrand; is that correct?

A Right.

Q How many children are there in your family?

A Just me, Walter and Karl. Three.

Q Okay. If you would, I would like you to tell us a little bit about where you and your two brothers were born and something about your mother. Would you do that for us, please.

A We were born in Germany, and we all have different fathers. Walter's father is the Puerto Rican and -- but my mom was never married to him. She met him over there. He was military.

Q Was he in the U.S. military, do you know?

A Yes, uh-huh.

Q And when you say Puerto Rican, was he a white person or some other race, or do you know?

A I've never seen him. I just -- you know, she has told us that he was Puerto Rican.

Q I'm sorry. I interrupted you. Why don't you go ahead. You were telling us of the fathers of you three children.

A Okay. Karl's father is the black, and she also met him -- he was military there, and she wasn't married to him either. And my father is German. He was in the German Army, and she wasn't married to him either.

Q Okay. Did any of you children know any of these three men at any time in your lives?

A No, we didn't.

Q Do you know your mother's maiden name?

A Gable.

Q And was her -- is her first name Emma?

A Right.

Q So her maiden name was Emma Gable; is that right?

A Right.

Q And she is a German citizen; is that correct?

A Uh-huh.

Q Where in Germany -- and I'm talking about what city and what place she was working when she met these people, do you know?

A I couldn't tell you that. I don't know.

Q Okay. For how many of your years as a child did you live with your brothers in Germany?

A Like -- I was born before them, so I left Germany -- I believe I was six years old. We all left and came to the United States.

Q Okay. Maybe I could ask you if you can remember your brothers' birth dates, both Karl and Walter, and for that matter, yours, so we can get some dates here, please.

A Karl is October 10th, 1962 -- no, '64; and Walter is January 26th, 1962.

Q And your birth date?

A I'm July 21, 1960.

Q Okay. It is the case, is it not, that you're -- you had an adoptive father for many years; is that right?

A Yes, I did.

Q And could you tell us his name, please.

A Macey Lee LaGrand.

Q And what race is Macey Lee LaGrand?

A He's black.

Q Where did he meet your mother?

A In Germany.

Q Was he in the military?

A Yes, he was.

Q And he was also in the army, the U.S. Army?

A U.S. Army, uh-huh.

Q Do you know in what year you and the other two brothers were adopted?

A Well, like I say, we came here in '66, so it was probably right before we came to the United States.

Q And the adoption, then, took place in Germany; is that right?

A It took place in Germany, uh-huh.

Q Now, when you were growing up, then, the one father-figure, if you will, in your lives as children was Macey LaGrand; is that right?

A Right. That's correct.

Q Now, when you returned to the United States, where did you and your family live?

A When we first came here, we came to Brooklyn, New York.

Q And why did you go to Brooklyn?

A My stepfather had relatives there that he wanted to visit.

Q Okay. And how long were you in Brooklyn as a family?

A Anywhere from two to four months, maybe.

Q And where did you go next to live?

A We went to Fort Hood, Texas.

Q That would have been about the year 1966?

A Right, uh-huh.

Q And how long did you live in Fort Hood, Texas?

A I'd say about two years, maybe.

Q Okay. Through about 1968; would that be right?

A Uh-huh. Uh-huh.

Q And while living in Texas, did you live on the military base there?

A For a while we did, yeah, and then we moved off the base to a town called Killeen.

Q How long did you live on base?

A I don't remember how long we were there.

Q Was it a year or a couple of months or do you know?

A I'd say approximately a year.

Q And then you moved off the base?

A Yeah, we moved off base then.

Q And where did you live then?

A We were living in a town off base called Killeen.

Q Did you live in the same house for that whole period of time?

A No. When we were on base, we were living in quarters, and then we moved off base and my stepfather and my mom they were buying a house.

Q Okay. And how long did you live in that house there?

A About a year.

Q After that year, you moved again, did you not?

A Yes, we did.

Q And you moved to -- I think you said Fort Benning, Georgia?

A Fort Benning, Georgia.

Q And that would have been in 1968?

A Uh-huh.

Q And how long were you there?

A A year.

Q And where did you live while you were in Fort Benning, Georgia?

A We were in quarters for a while on the base and then we moved off base.

Q Can you tell us about how long you lived on base in terms of months?

A Maybe three, four months.

Q And then you moved off base?

A Yeah.

Q And that would have been for the balance of the nine months that you lived in Georgia?

A Right.

Q And then where did you move after you left Fort Benning, Georgia?

A We moved back to Texas. He was stationed back there again.

Q And how long were you in this location?

A Okay. We were there up until about '70 then.

Q About 1970?

A Uh-huh.

Q That would be about one year that you --

A Yeah.

Q -- lived there?

And was that Fort Hood, Texas, again?

A Well, we were in Killeen, the town of Killeen.

Q So you moved back to the same city?

A Uh-huh.

Q After that year in Killeen, where did you go?

A We were stationed at Fort Huachuca, Arizona

Q And that would have been in the year 1970?

A 1970, yes.

Q And how long were you at Fort Huachuca?

A We were living at Fort Huachuca about -- from '70 to about '73, I'd say.

Q And what happened in 1973?

A Then my stepfather he had orders to go to Mannheim, Germany, and he went, but we didn't go with him right away because he had to go get quarters before we can go over. So we didn't go over until in '74.

Q Okay. And then you, your brothers and your mother returned to Germany; is that right?

A Right.

Q And how long were you in Germany?

A We stayed five months.

Q And what happened while you were over in Germany?

A Well, we went over there. We got there, and when we got to the quarters, my stepfather didn't have anything there for us, shit, no dishes, no food, nothing. And my mom had found out that he had had another woman living in the quarters with him, and so she had to go down -- there's this place you go down there to get dishes and things until your stuff comes over, and so she found out that he had another woman living there. He would never stay home hardly ever. He was always at this other woman's apartment. He wasn't supporting us like he should have been.

Q This was while you were in Germany?

A Right.

Q Did any of this type of behavior by your stepfather happen before he went over to Germany?

A Once I remember when he was in Vietnam he had some leave time coming. He was supposed to take us to Hawaii, and then he had wrote my mom and told her that he couldn't take his leave, but later, as he returned, she had found some things of his that he had taken another woman to Thailand.

Q Okay. And the family learned about that?

A Uh-huh, we knew because she told us.

Q And when was that, if you can remember the year?

A I can't remember that.

Q In any event, when you lived in Germany and when you went back there with your mother, you never did live with Mr. LaGrand as your father; right?

A No, not really because, like, he would come once in a while and then he'd go. It was just an on-and-off thing.

Q Now, Walter would have been about 11 or

12 when this was happening?

A Yes, somewhere in there.

Q Do you recall what his reactions to this situation were?

A Like, my stepfather he would take the boys over to this woman's apartment, but they would never come back and tell my mom anything. He would never take me because he knew I would come back and let her know what was going on, because — he would take them because he knew that they -- I believe they were more or less frightened of him -- that they wouldn't let my mom know anything, see. So --

Q But there were several occasions, were there, when Walter and Karl would go over to wherever this other woman was living and they, the boys, would stay with your stepfather and this woman?

A Yeah. Sometimes he'd take them over there for, like, a week and then bring them back, because one time he'd bring -- I believe it was Walter back — I believe it was Walter — and my mom had to rush him to the hospital. He had gotten blood poisoning. He had a streak up his arm.

Q So your stepfather was not taking good care of Walter and Karl while they were with him at this lady's house?

A No, I don't believe so.

Q Now, you said that Karl and Walter were afraid of their stepfather?

A Yeah.

Q What do you mean by that?

A Well, he would -- anytime, like, they would run away or something, he would beat them. I mean he would leave marks on them, and I think that frightened them, too, you know.

Q Do you recall any particular beatings that stand out in your childhood in your mind that concern either Walter or Karl?

A I know one time they got beat with, like, a clothes rod that you hang clothes up on. I can't remember what they did, but I do remember them getting whipped with that.

Q Did it leave marks, beating marks on these boys?

A Yes, it did. Yes.

Q And did you think at the time and do you think now that the beatings that they received were excessive or more than what was necessary to punish them?

A I think it was more than what was necessary.

Q And did these beatings affect the boys' relationship to their stepfather?

A Yes. It made them frightened of him, I think.

Q Now, you say that they would run away. You're referring to both Karl and Walter; is that right?

A Right.

Q Would they run away after a beating had occurred by their stepfather?

A Yes.

Q And then the authorities would bring them, that is the boys, back to the house; right?

A He would either find them or the police would. My stepfather would or either the police.

Q And when he -- when the boys were returned to the house, were they punished?

A They were beat again.

Q Okay. Patricia, while the boys were growing up in the house, and particularly with regard to Walter, do you remember him ever asking about his father and the situation with his natural father?

A Yes. He's asked my mom quite a few times about who his father was and if she knew where he was because he wanted to meet him, but my mom says that -- you know, she -- she said he was a Puerto Rican but -- she probably had mentioned the name, but I can't remember the name, but that it happened that she just got pregnant by him and then he came back to the United States.

Q I take it, then, that Walter never did learn who his natural father was?

A No, he didn't.

Q Did this appear to bother him as you observed him?

A I think it did. I would say it did.

Q Now, you indicated that you and your brothers and your mother stayed in Germany the second time for about six months; is that right?

A Five months. Exactly five months.

Q What happened at the end of that five-month period?

A My mom had the military ship her back to Sierra Vista, Arizona, then because she had a job that she can go back to there.

Q All right. Maybe you can tell us a little bit about your mother's background and what her skills are, in terms of her working skills.

A Okay. At the time we came back she was -- well, before we even left for Germany, she was working at the NCO Club as a waitress, and then we went over to Germany. She was also waitressing at an NCO Club there on the base, and when she had the Army move her back to Arizona, she went back to the NCO Club as a waitress also, and she worked there a while. And then there's a golf course down there in Sierra Vista and a snack bar part, like, belonged to the NCO Club, and she started to work there again. And then she found a job at the mess hall at Fort Huachuca, and she worked there for, oh, a year or so, maybe. I can't quite say. And then she was in a car accident.

Q This was a very serious car accident?

A Yes, it was.

Q Tell us about her injuries.

A She was -- I was at work the night it had happened, and my uncle came to my job to get me. And she was walking -- well, the car had broke down, so she walked to the grocery store, and she had a grocery cart, and she was pushing it back home, and it was dark out already; and this guy, he was coming out into the street, and he didn't have his car lights on yet, and he had been drinking and he hit her.

Q How bad were her injuries?

A It was real bad. She was put in the hospital for, like, nine months on and off, in and out, and she had lost a kneecap in her -- I believe it's her left knee. I'm not quite sure.

Q Has this accident since -- this happened in 1976; is that right?

A '76.

Q Has this affected her ability to work?

A Yes, it has. She can't work at all any more.

Q And since 1976, she's been on welfare; is that right?

A Well, she was on welfare and then just recently, about a year ago or maybe not even that long ago, they finally started giving her disability and Social Security.

Q Okay. But from 1976, the time of the accident, until very recently, the last several months or six months, your mother was receiving welfare; is that right?

A Yes, she was.

Q With regard to the family and income, with your mother either working as a waitress or later on welfare and -- after the divorce from Mr. LaGrand -- was there any support from Mr. LaGrand financially?

A No, there wasn't, but in her divorce copy she had gotten, he was supposed to pay 75 for each child, which he never did.

Q So after the divorce, even though the court ordered it, your mother never received any support money for you and your two brothers; is that right?

A No, she didn't.

Q As a result, it's the case, is it not, that you and your brothers were pretty hard up financially?

A Yes, we were.

Q And you moved around quite a bit in your younger years; is that right?

A Yes.

Q Did you ever feel you had any place you could call home?

A I don't understand.

Q Well, you never lived in one place long enough for everyone to agree that this was home; right?

A Right. Right, uh-huh.

Q Now, when you finally moved to Sierra Vista, that's where the marriage actually fell apart, as you remember it; right?

A No. It fell apart when we went over to Germany in '74.

Q But the fights and the arguments and so forth had started by that time, hadn't they?

A Oh, yeah.

Q That was a pretty constant part of the relationship between your mother and your father, your stepfather; right?

A Right.

Q How big is your mother in terms of her physical stature?

A She's about five three. She's medium, I'd say.

Q Fairly short woman?

A Yeah.

Q And when the boys were growing up and after the father had left the house, she had a good bit of trouble controlling these young teen-agers, didn't she?

A Yes, she did.

Q And it's during their early teens, is it not, that they first started running away from home?

A No. They ran away before they were teen-agers.

Q Preteens. In Georgia, in fact; is that right?

A Right.

Q And that pattern of behavior really started back then; is that right?

A Right.

Q And their problems grew and they became more involved with the law as they grew older?

A Right.

Q And all that time there was no father-figure around the house to deal with them, was there?

A Right, there wasn't.

MR. BURKE: May I have a moment, Your Honor. I have no more questions, Your Honor.

THE COURT: Mr. Gerson, do you have any questions?

MR. GERSON: No, Your Honor.

MR. ALFRED: No questions.

THE COURT: All right. Thank you.

MR. BURKE: May she be excused, Your Honor?

THE COURT: Yes.

MR. BURKE: I have no further witnesses, Your Honor.

THE COURT: All right. Mr. Gerson?

MR. GERSON: Yes, Your Honor. I call Dr. Edward Meshorer.

EDWARD MESHORER, M.D.,

being first duly sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. GERSON:

Q State your name, please.

A My name is Edward Meshorer.

Q Could you give the Court a little background information as to your education and training.

A Yes.

Q I don't think you need go through every place you've been, but the highlights.

A Okay. I'm a diplomate of the Board of Psychiatry and Neurology, and I'm also a diplomate of the Board of Mental Hospital Administrators. I'm a -- formerly -- formerly -- formerly I was a psychiatric consultant at Fort Huachuca-Sierra Vista, Arizona; former instructor of psychiatry at Harvard Medical School and Tufts Medical School, both in Boston; former superintendent of a school for the retarded, and also I've been in practice in medicine for 46 years and the last 32 years in psychiatry; and I'm a member of many medical societies, such as Pima County, Arizona, Massachusetts, Tucson. I'm a life fellow of the American Psychiatric Association, and I'm a fellow of the American Society of Clinical Hypnosis, and I'm on the staff of practically all the hospitals in Tucson.

Q You have been in practice in Arizona for how long?

A Yes, since 1972.

Q Since 1972, have you had occasions to testify in the court systems of Arizona?

A Yes. Here and Cochise County and also Maricopa.

Q Could you give us a rough idea as to how many times.

A Oh, not too often, thank goodness. E

Q Okay. You've been called upon to do Rule 11 examinations in Pima County and Cochise County?

A Yes.

Q You've testified in court?

A Yes.

Q And you have been qualified as an expert in your field?

A Yes.

Q You, on my request, did an interview with Karl LaGrand, did you not?

A Yes, I did.

Q And when did you perform that interview?

A I did it on May 18, 1984.

Q That's some six months ago?

A About four months ago.

Q You were given information by me, were you not, to --

A Yes, I was. I was given the tapes of the interview by -- I think it was Mr. Barkman -- of Mr. LaGrand, Mr. Walter -- no, rather Karl LaGrand which I listened to several times.

Q Okay. And you were given a copy of the confession, were you not?

A Yes.

Q And you were given Karl LaGrand's VisionQuest file and other social data on him, were you not?

A Yes, sir.

Q Basically your main function that I asked you was to, was it not, form an opinion as to -- for purposes of testifying at this particular hearing, was it not?

A And in mitigating circumstances.

Q And it was after Karl had in fact been convicted?

A Yes, sir.

Q Not prior to trial?

A Yes, sir.

Q And you have listened to the tapes I supplied to you very recently?

A Yes.

Q Before I play them, you've listened to the social background that Patricia LaGrand supplied and the background that Dr. Gurland supplied us with. Would your opinion as to Karl LaGrand be similar to the opinion that Dr. Gurland gave as to Walter about his likelihood of success in society?

A It would be very similar.

Q Basically is it your opinion that he didn't stand a chance, would that be --

A Well, I don't understand what you mean by "couldn't stand a chance," but he certainly --

Q Well --

A Go ahead.

Q I'll --

A Well, he certainly had a very unusual upbringing in Germany and his interaction with the stepfather, Mr. LaGrand. I would say that, yes, that he had, as we say, two strikes on him before the game began.

Q Did you find the interracial aspects of the upbringing to be significant?

A Yes, I would.

Q Would you explain that to the Court.

A Well, Germany isn't exactly like France or Italy or Spain. They're color-conscious, and they -- they don't look very kindly at interracial marriages, and this affects the marriage and affects the children, interpersonal relationships of the children with the German kids in Germany and would affect adversely on the LaGrand children, on -- particularly on Karl.

Q How long did you interview Karl?

A About an hour and a half.

Q Did you feel it was necessary to talk to him any more than that?

A No. No. I think I've got enough information on him. In view of my experience with such people over a period of years, I thought an hour and a half was sufficient.

MR. GERSON: Okay. What I would like to do now, Your Honor, is play my copy of the -- of the confession of Karl by -- that Deputy Barkman took.

Q Could you listen carefully and I'll ask you some questions about it.

(Whereupon, the tape was played.)

BY MR. GERSON:

Q Dr. Meshorer --

A Yes, sir.

Q -- you've listened to the tape before?

A Yes, I have.

Q And you did not have any trouble understanding it this time?

A No, I haven't.

Q Okay. Bear with us. I'm going to let you listen to the subsequent confession taken at St. Mary's Hospital, then I'll ask you questions about both of these.

A Yes, sir.

(Whereupon, the tape is played.)

MR. GERSON: I think that's all there is on this one, Your Honor. I would like to reintroduce the tapes that are already into evidence which are the originals.

MR. BURKE: I'd join in that, Your Honor.

THE COURT: Were the tapes that you just played marked?

MR. GERSON: No. These are copies of the ones that are in evidence.

THE COURT: Well, if they are copies of something that is already in evidence, there is no need to mark those.

MR. GERSON: Yeah, I'm not going to introduce these. Just reintroduce the ones already in evidence.

THE COURT: Fine. They were introduced either at trial or at a suppression hearing or something like that.

MR. GERSON: Motion to suppress, Your Honor.

MR. BURKE: There's a motion to suppress in which they were admitted and also the transcripts, and I'd request for the record's sake that those tapes and those transcripts be admitted.

THE COURT: All right. I know they are in the record somewhere, both the tapes and transcripts.

MR. GERSON: Does the Court want to take a recess?

THE COURT: Yes, let's take a recess.

(Recess)

THE COURT: All right. Mr. Gerson, go ahead.

MR. GERSON: Thank you, Your Honor.

Q Dr. Meshorer, the tapes took a little longer than I had remembered they took. **I apologize for making you sit there, and it's getting late so I'm going to try to go as fast as I can.**

You interviewed Karl LaGrand in May?

A I did.

Q And you have interviewed over the last 30, 40 years untold numbers of people, have you not?

A Yes, I have.

Q You have experience -- vast experience in interviewing people?

A Yes, sir.

Q Okay. Did Karl LaGrand recite what had happened to you during the course of your interview?

A Yes.

Q Was it consistent for the vast majority of it to what you've heard here today?

A It was in both interviews.

Q You were listening to the tapes pretty carefully, were you not?

A Yes, I was.

Q Did you have occasion to keep track of how many times during the course of that interview Karl LaGrand said, "I didn't mean to do it," or something to that effect?

A Yes. In the first one -- it was 29 minutes in duration -- he repeated it about 12 times, that he didn't mean to do it, crying and coughing and hyperventilating at the same time. And in the second interview he -- which lasted 42 minutes -- he said it 12 times again, he wished he hadn't done it and he didn't want to do it, he didn't intend to do it.

Q Based upon your experience in interviewing people and listening to the tapes and interviewing Karl LaGrand, did you form an opinion as to Karl LaGrand's truthfulness during this interview?

A It's my opinion that Karl LaGrand was very truthful and very sincere in what he was saying.

Q On these two tapes?

A Yes.

Q Did you find any particular significance to the fact that he was hyperventiling, that he was coughing, that he was, oh -- well, crying, the coughing, the hyperventilating? And I'll tell you we did have established at a prior hearing that Karl LaGrand did hyperventilate, in fact had a nosebleed.

Did you find any significance to that?

A A great deal of significance. This is part of the bodily manifestation of anxiety generated by guilt, and it also shows sincerity in what he's saying.

Q So that you have no doubt that he was being sincere in his remorse that was expressed?

A Yes.

Q And that his -- what he told you that he was being truthful?

A Yes, sir.

Q Okay. In the course of interviewing Karl LaGrand, listening to the tapes, reviewing anything, do you find any mitigating factor in what you've heard today?

A Well, the most mitigating factor, Your Honor, and ladies and gentlemen, is the method in which the crime was performed. If you go over the details of the crime, the manager was tied, his hands were tied and he was seated.

Dawn Lopez, the girl, was sitting, standing, crying, also in front of him. Karl LaGrand was standing in front of the desk and trying to keep the girl quiet and then she cried some more. She cried even more.

So he got angry, and Karl made an attempt to sort of hold her down with his hands apparently, and that's when the manager kicked him, because the manager thought that Karl was going to do something to her, to Dawn. Whereupon -- this is on the spur of the moment -- he just grabbed the first thing he could lay his hands on, which were behind -- on the desk, and he grabs this -- this letter opener.

This, to me, is not premeditation. You certainly don't kill people with letter openers unless, course, it's an unusual -- unusual letter opener that's very sharp, and I haven't seen any of those. But assum that it is, the very fact of the act, to me, shows no premeditation whatever. It was the spur of the moment, and this also applies to Dawn Lopez.

MR. GERSON: Okay. Thank you.

THE COURT: Mr. Alfred?

CROSS-EXAMINATION

BY MR. ALFRED:

Q Dr. Meshorer, you were apprised of -- of all the details as to how this crime occurred?

A I thought I was, yes.

Q Are you aware of -- were you aware at the time you interviewed Karl LaGrand of Dawn Lopez's version of how this crime occurred?

A Yes.

Q How were you made aware of that?

A I was told by the attorney that Dawn Lopez had a different version of it.

Q Okay. He told you that she had a different version?

A Yes.

Q Okay. Did you ever read her testimony or any of her statements?

A No, I didn't read the testimony.

Q Did you witness her testimony or -- let me just ask that. Did you witness her testimony?

A I did not.

MR. ALFRED: Thank you. I think that's all I have.

MR. BURKE: One or two questions, Your Honor.

CROSS-EXAMINATION

BY MR. BURKE:

Q Dr. Meshorer, I believe in earlier testimony you referred to the cultural setting in which these young men grew up, that is the State of -- the Republic of Germany?

A Yes, sir.

Q And you referred to the color-consciousness of that country. Obviously those factors that you identified as mitigating factors concerning Karl's upbringing in that environment would also apply to Walter, would they not?

A Certainly.

Q And so considering the information that you had to evaluate and in providing testimony here today, those factors you identified as mitigating factors in Karl's situation would apply to Walter as well?

A Yes, sir.

MR. BURKE: No further questions.

MR. GERSON: I have nothing further, Your Honor.

THE COURT: Let's make sure I understand you, Doctor.

You said that he was crying and hyperventilating and coughing. Is this when you were interviewing him?

THE WITNESS: No.

THE COURT: You mean on the tape?

THE WITNESS: On the tape, yes, sir.

THE COURT: I see.

THE WITNESS: You can't sustain -- let's see. The crimes occurred when? 1982, was it? Well, anyway -- and I saw him in May, four months ago. You can't sustain that kind of a reaction for four months.

THE COURT: All right. Thank you.

MR. GERSON: Your Honor, I would just -- I have a report from a Dr. Hertz that I have disclosed, and I would just like to file it at this time. He was the tester that we had some time ago.

THE COURT: All right. I'll have this made part of the record, too, along with some of these other written materials.

MR. GERSON: And, Your Honor, I would call no more witnesses.

THE COURT: Do you have any more exhibits that you want to --

MR. BURKE: Yes, Your Honor. I have a letter I would like to offer. Also I would like the Court to reconsider the trial and in limine testimony of Dr. Loftus which would be a part of my argument. I can just refer the Court to that and if Your Honor --

THE COURT: Well, of course I can, under the statute, consider anything that was offered at the trial and, I suppose, any of the testimony -- any of the pretrial hearings also.

MR. BURKE: That's the only difference between the statute and what I'm proposing is that you

THE COURT: I think if we have enough time to do it, I ought to take up this motion that you filed.

MR. BURKE: Thank you, Your Honor. It's the motion --

THE COURT: Do you think we have enough time to do it now?

MR. BURKE: Yes. I can be very brief.

My arguments are concise and to the point, and I rely on one case, that is State vs. Ortiz, which is cited in my memorandum. It's my opinion, Your Honor, that reading that case the State has failed to meet its obligation under the due process of law and the Fourteenth Amendment because under the case law, as stated in State vs. Ortiz, the State has three duties prior to mitigation-aggravation hearing which it must comply with in order to seek the death penalty and in order to have it imposed.

THE COURT: You don't need to go so fast that I'm not going to be able to hear you.

MR. BURKE: Okay. My argument simply is this: The State has three duties, none of which it has met. Number one, they have to give the defendant and the Court notice of aggravating circumstances that the State wishes to rely on under Section 13-703. Those -- if you'll recall, that's the statute that refers to the aggravating circumstances.

THE COURT: Are these things all laid out now in the case?

MR. BURKE: Yes, they are, and I'm simply reciting that case to you, in essence. Number two --

THE COURT: What's number one again now? Oh, the aggravating circumstances.

MR. BURKE: Right. In addition to identifying those statutory aggravating circumstances, the State has an obligation to identify the facts which they seek to rely on -- it seeks to rely on in proving aggravation; and, number three -- and this is the critical factor -- they have to give that notice -- it has to give that notice sufficiently in advance of the mitigation-aggravation hearing to put the parties and the Court on notice and to have an opportunity for those parties to defend, to rebut any of the evidence that the State may seek to rely on or the statute that the State may seek to rely on.

In this case none of those things have been done. There is a filing in the file filed in November 1983 which indicates that the State seeks to impose the death penalty if the defendants or any of them are convicted of first-degree murder, but that pleading is wholly lacking in terms of the requirements of Ortiz because it fails to do anything other than what I just said. It fails, for example, to cite to the statute in subparts. It fails further to cite to the facts which will be relied upon. In essence, we have nothing from the State, Your Honor, and I think the sanction at this point, since this matter has been pending for aggravation and mitigation for many months since the trial, that the time has come and gone for the State to respond; and given those -- that failing, it's my view that the Court should impose the sanction of precluding the State from seeking to aggravate this conviction and thereafter impose the death penalty.

THE COURT: Where in the case does it say that that's the proper remedy?

MR. BURKE: It gives no citation or reference to any remedy, Your Honor. In that case, in Ortiz, the State met its obligations, and that is a different situation than the one we face here.

MR. GERSON: Your Honor, I would just join in Mr. Burke's motion and specifically his request for sanctions.

THE COURT: Mr. Alfred?

MR. ALFRED: Your Honor, Mr. Burke is absolutely correct in his citation of State vs. Ortiz. The requirement that he speaks of is apparently something that they came up with in that case. I was unaware of the specifics of the requirement. The -- as the Court knows, there is nothing in either the statutes or in the criminal rules that requires this type of disclosure. As the Court also knows, the statute itself, 13-703, restricts the State to seven factors and seven only that can be used in the aggravating circumstances.

I think that the pleading that Mr. Burke says that I'm obligated to file as a result of the Ortiz case would be, in this particular case, a form-over-substance type of thing since what I plan to use by way of aggravation -- of course, I'm limited strictly to the seven circumstances that are listed in 13-703(F) of which we all are charged with notice and which if anyone had been involved in this case for any period of time at all simply by reading them one would know what applies.

Also, I do not intend to bring in anything that is outside of the record in this case, which I think the Ortiz case -- I don't know if it does in the specific circumstances -- I think it does -- in Ortiz I think they attempted to use or did use something in aggravation that was in fact outside the record in the case and was not part of the evidence or testimony, and in that sort of instance, I would perfectly agree that that type of disclosure is indeed inappropriate.

What they seem to be concerned about is

the defendant having a reasonable opportunity to prepare rebuttal.

I will state on the record now that I intend to use 13-703(F), Subsections 2, which is -- involves prior convictions which have long been a part of the record in this case.

Number three, that the defendant knowingly created a grave risk of death to another person, that being Dawn Lopez, which has also been a major part of this case in the whole period of time it's been going on; that the offense was committed -- number five, the defendant committed the offensesin consideration for the receipt or in expectation of receipt of anything of pecuniary value; and Subsection 6, the defendant committed the offense in an especially heinous, cruel or depraved manner.

Again, no evidence will be presented that is not already a part of the record in this case and of which we are all charged with knowledge of.

If the --

THE COURT: Well, I think you've got to do more than just list the subsections of the statute that you're relying on.

MR. ALFRED: If this Ortiz case requires a -- I guess a listing or a formal listing of these Subsections 2, 3, 5 and 6 and disclosure of the evidence the State will use, I guess I will certainly do that.

THE COURT: The evidence has already been presented, and we all heard it.

MR. ALFRED: Exactly.

THE COURT: But it seems to me that the defendants, under this case, are entitled to notice of which specific facts that were presented in evidence that you're relying on.

MR. ALFRED: Apparently that is what that case requires but, however --

THE COURT: The evidence -- it's already in. I guess, then, that it's up to the lawyers to argue whether these particular facts that are being relied on fit within the aggravating categories or not. Then I suppose there are also some things which are -- although the evidence is in, the evidence was conflicting on a number of these things, as we know. There were some considerably different versions of what took place. Then what happens at that point? Is it up to me as the -- I guess I'm the trier of fact on the -- on the aggravating and mitigating circumstances, I think.

MR. ALFRED: That's correct.

THE COURT: And then do I decide which version of the facts I think is true if there's a conflict between them?

MR. ALFRED: I think you have to perform a -- at least a -- almost like a jury function here, a one-man jury, in that you have to decide, one, whether or not these aggravating circumstances exist and whether or not these mitigating circumstances exist, and I guess the way in which Your Honor decides whether these exist is just to weigh the evidence and decide which evidence deserves credence.

THE COURT: What's the burden of proof? Beyond a reasonable doubt?

MR. ALFRED: I believe so.

THE COURT: And, indeed, the statute requires specific findings.

MR. ALFRED: It does.

THE COURT: Well, what do you propose? What do you suggest as a procedure?

MR. ALFRED: Your Honor, as the Court pointed out, there's no sanction or -- provided for in the case, and, of course, there's nothing in the statute as a rule that even requires this disclosure.

THE COURT: Well, if the defendants could show some prejudice by failure to meet any requirements of this case, that would be one thing, but I haven't heard anything which would indicate any prejudice.

MR. ALFRED: Well, that was going to be my next point.

THE COURT: Particularly if I now require or permit a filing of something which will remedy the defect. I don't see how any additional delay that might be entailed would be prejudicial to the defendants.

MR. ALFRED: The only thing they seem to be concerned with in the Ortiz case is that the defendant have a reasonable opportunity to prepare rebuttal. They also have a right or had a right to be sentenced within a certain period of time, but I think we can agree that that was waived a long time ago. And if there is to be any prejudice, it would possibly only be if a delay causes them to fall outside the time that they had a right to be sentenced in and they had not waived that.

THE COURT: Well, certainly any delay up to now -- there's been a waiver of any -- any delay.

MR. BURKE: May I address that question, Your Honor?

THE COURT: Yes.

MR. BURKE: It seems to me that there is one critical factor that the State has failed to point out to you and that is we've gone ahead with our mitigating evidence and now at the -- after hearing all that and deciding what has been proven and what has not, it is now going to be apparently the State's opportunity, if the

State gets it way, to go ahead and do what it was required to do before the hearing. I can't tell you what aggravating -- or what prejudice I will suffer in addition to the delay, and I will tell you that I raise that subject before you because --

THE COURT: Wait a minute. This is the first time there's been any objection to a delay.

MR. BURKE: Correct.

THE COURT: So if there's any problem -- or any time clock starts running, it doesn't start running until right now.

MR. BURKE: That's right. That's what I'm suggesting, Your Honor. To date, it's been by stipulation. In fact, it's been by stipulation that this aggravation hearing be set over a month ago, and so the State, just as the defendant, was on notice of what its obligations were. We've met our obligations. The State has not, and I think that's the fact that comes down to a decision in this case that they should be precluded from doing so, having permitted us to go ahead with our mitigation.

And so I'm not suggesting to you that any delay prior to this hearing has been anything other than by agreement but beyond it it will be.

THE COURT: If you'd made this point at the start of the hearing this afternoon, I wouldn't have let you go ahead and put on that evidence this afternoon. I would have heard the arguments on this motion right then and there.

If there's any prejudice by reason of the defendants putting on their mitigation testimony first -- and I fail to see how there could be -- but if there is any, I think that was certainly waived, too; and it's not a matter of letting the cat out of the bag because Mr. Alfred's not going to come up with anything new. He's told you -- he's told us all along that he's going to rely on the evidence that was presented at previous hearings.

All right. I'm going to deny the motion that the State be precluded from arguing that there were aggravating circumstances, and I'm going to order that the prosecutor may have leave to file a notice or pleading meeting the requirements of State vs. Ortiz.

I'm going to continue the present hearing until a date which I'll set after I've had a chance to take a look at the calendar, and I'll enter some sort of a time requirement that Mr. Alfred file whatever he's going to file within a -- or not less than a particular length of time before that hearing, and the number of days that keeps popping into my head -- and don't ask me why -- is 21 days. Now, don't ask me where I get that.

MR. BURKE: I think you may be thinking of what State vs. Ortiz talked about. They talked about 23 days prior, but I don't see any rule that requires --

THE COURT: No, there's no rule on it.

MR. BURKE: Okay. I see what you mean.

THECOURT: I don't know where I'm getting 21 days. If you think some other time limit is appropriate, why, say so. You are entitled under the Ortiz case to disclosure -- here's what the case says, "sufficiently in advance of the hearing that the defendant will have a reasonable opportunity to prepare rebuttal."

MR. BURKE: Correct.

THE COURT: Under certain circumstances, that could be as little as two days. Indeed, in the Ortiz case, there was one thing that was disclosed only two days before the hearing, and the Supreme Court said that was enough because it couldn't have been rebutted anyway. Other things I could conceive could take quite a bit of time.

MR. BURKE: Obviously we're not in a good position to respond until we know which facts the State's relying on.

THE COURT: That's true. Well, I'll go one step further and order that the prosecutor file this notice or pleading within seven days of today.

MR. ALFRED: That is sufficient.

THE COURT: All right. And when he files it, if you don't think you're getting enough time, Mr. Burke, why, say so, or if you think that you're somehow prejudiced at that time, say so.

MR. BURKE: I will raise that, Your Honor.

THE COURT: Well, anyway, you have an idea anyway of the time frame I'm talking about.

All right, gentlemen, I think we've done all the good we can today.

MR. BURKE: Thank you.

(December 12, 1984.)

THE COURT: In State against LaGrand, this is the time that was set by stipulation of counsel for oral argument on the issues pertaining to sentencing, and I think it's also a continued aggravation-mitigation hearing, and I'll take up anything that's appropriate to be taken up at this time.

I know that various memos have been filed, which I have -- which I have read. At the hearing at which Dr. Gurland and the other doctor testified there was at least one exhibit admitted into evidence, and I want to make sure that there isn't anything that I've overlooked that should be considered. Exhibit A was a letter to myself from the defendant Walter LaGrand. Also there is in a package of material here, which I believe was submitted to me by Mr. Gerson, a psychological evaluation by Dr. Hertz.

MR. GERSON: Yes, Your Honor. That was submitted by me.

THE COURT: Well, all right. And there is a written report from Dr. Meshorer.

MR. GERSON: Yes, Your Honor.

THE COURT: That seems to say the same things -- I was scanning it -- as he testified, but anyway here's the document. Here is a letter from the defendant

Karl LaGrand with some -- well, it's a couple of letters and a diagram.

Are those to be considered as exhibits?

MR. GERSON: Yes, Your Honor.

THE COURT: All right. Then I'm going to direct the clerk to mark them all into evidence so that the record will be complete.

Is there anything else by way of documentary evidence that hasn't actually been admitted? I remember that at that hearing I listened to the tape recording of the statement by Karl LaGrand to Deputy Barkman. That was played at that time. Of course, I'd heard that before.

MR. GERSON: Yeah, I think it's been previously --

THE COURT: It's been marked several times because it was in evidence at various hearings.

MR. GERSON: And we would resubmit it.

THE COURT: Suppression hearings and that sort of thing. There are transcripts of that interview floating around, too, that are in the record where they could be located.

MR. GERSON: Yes, Your Honor.

THE COURT: All right. But the main thing I want to find out now is the documents I just enumerated you want me to make a part of the record; is that right?

MR. GERSON: Yes, Your Honor.

THE COURT: All right. They'll be marked into evidence then, and I will also consider that tape recording of the statement and, for convenience, also any transcripts of it.

All right. I'm here to listen or receive anything that you think is appropriate to present. I've already told you I've read these legal memos, and I'm ready to hear you amplify on them, explain them, add something else, whatever.

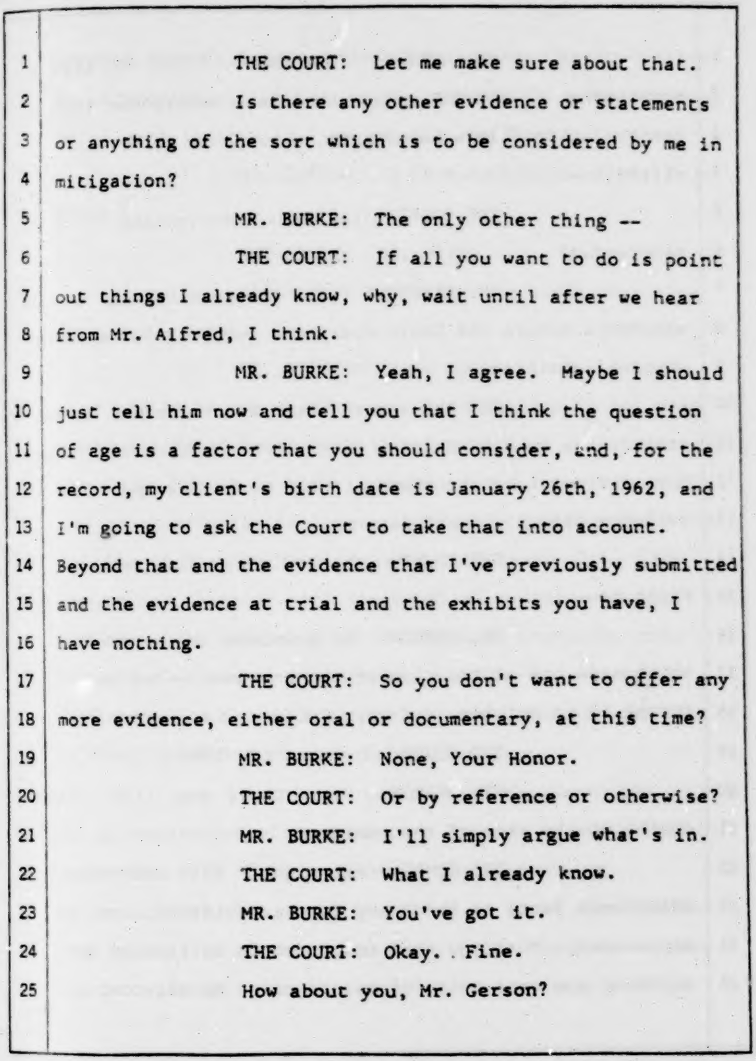
MR. BURKE: Your Honor, I certainly can go first. I think that no matter who goes first it has to be understood -- and I know the Court recognizes -- it's the State's burden.

THE COURT: Yes, I know.

MR. BURKE: As it is in all other matters, and maybe you want the State to be heard first.

THE COURT: I don't care. As long as anybody has something to say and it isn't being repetitious I'll let you keep going.

MR. ALFRED: That would be the normal course of procedure for me to lead off, but I take it that Mr. Burke, then, has nothing else he wishes to offer by way of memorandums, proofs, exhibits --



THE COURT: Let me make sure about that.

Is there any other evidence or statements or anything of the sort which is to be considered by me in mitigation?

MR. BURKE: The only other thing --

THE COURT: If all you want to do is point out things I already know, why, wait until after we hear from Mr. Alfred, I think.

MR. BURKE: Yeah, I agree. Maybe I should just tell him now and tell you that I think the question of age is a factor that you should consider, and, for the record, my client's birth date is January 26th, 1962, and I'm going to ask the Court to take that into account. Beyond that and the evidence that I've previously submitted and the evidence at trial and the exhibits you have, I have nothing.

THE COURT: So you don't want to offer any more evidence, either oral or documentary, at this time?

MR. BURKE: None, Your Honor.

THE COURT: Or by reference or otherwise?

MR. BURKE: I'll simply argue what's in.

THE COURT: What I already know.

MR. BURKE: You've got it.

THE COURT: Okay. Fine.

How about you, Mr. Gerson?

MR. GERSON: Your Honor, I did not file a memorandum. I did not intend to file a memorandum and don't plan to file a memorandum, a response to Mr. Alfred's --

THE COURT: You mean a sentencing memorandum?

MR. GERSON: Yes. I intend to rely on the arguments before the Court today and our previous evidence that we submitted.

For the record, Your Honor, as Mr. Burke stated, age is a mitigating factor. I don't know -- since Karl did not take the stand, it has never been put into evidence what his birth date is.

THE COURT: Why don't you just tell me right now.

MR. GERSON: It's October 10th, 1963, which made him at the time of the incident -- he had turned 18 in October, and this incident is January 7th.

THE COURT: October 10, 1963.

MR. GERSON: Yes. So 18 and, like, three months at the time of the incident.

THE COURT: All right. Then with that additional fact, is there any further evidence, oral or documentary, that you want to put on in mitigation or anything you want to refer to, to point me to, that I haven't already received that I -- you want me to consider in mitigation? I'll hear your arguments in a few minutes, but I want to know if I've got all the factual things.

MR. GERSON: I have nothing further, Your Honor.

THE COURT: All right.

All right, Mr. Alfred, I guess it's time for you to speak.

MR. ALFRED: Your Honor, I really have very little to say because -- I have nothing to say that would not be at least partially repetitious. I understand the Court has lived with this case for a long time and has had an opportunity to become intimately familiar with the details of the incident in Marana of January 7th, 1982, has become familiar with the physical evidence involved in the case, the testimony of the various witnesses, both now and at pretrial statements, and also has become familiar with the -- both past criminal history and past history otherwise of both defendants.

I poinced out to both the Court and counsel in my memorandum of September -- I think it was the 16th, September 16th of 19 -- 1984 -- the aggravating circumstances that would be relied on in an argument for the imposition of the death penalty for the first-degree murder offenses. In that memorandum I pointed out

13-703(F)(2), (F)(3), (F)(5) and (F)(6). On the first day of November of 1984, I submitted to the Court a fairly lengthy sentencing memorandum in which I outlined each one of the State's arguments for those respecting aggravating circumstances.

The Court has already said it has had an opportunity to read the memorandum, and perhaps the Court will have an opportunity to read it again.

I will -- I will not -- I do not intend now to go through each one of the arguments I made in the memorandum. I think the existence of the aggravating circumstances, (F)(2), (F)(3), (F)(5) and (F)(6), have been proven beyond any reasonable doubt by the evidence adduced at the trial and by the arguments made within the sentencing memoranda of the first day of November of 1984.

The aggravating circumstances in and of themselves, even though they exist, the Court is not required to automatically give a death penalty. The mitigating circumstances that have been offered are also to be considered, but I think the case law in Arizona is clear that these are not simply to be just counted; they are to be weighed, and this comes down to the discretion of the Court.

It is for the Court to decide even if the aggravating circumstances exist are they outweighed by the mitigating circumstances. There is no real guidelines on that. That is for the Court's individual determination.

I submit to the Court that the aggravating circumstances proven in this case cannot be possibly outweighed by the mitigating circumstances that were shown. The Court has seen the -- both the nature of the act itself and the nature of the prior criminal history of these two gentlemen show that society deserves the maximum protection from any possible future criminal acts by them.

I urge that the Court for the underlying offenses impose the longest possible term of calendar years; that the Court make these consecutive to the terms that are currently being served by them, and that for the crime of first-degree murder that the Court impose the penalty of death upon both defendants. Thank you.

THE COURT: Mr. Burke.

MR. BURKE: Your Honor, in approaching this hearing, I asked myself what could I say, what could I say to you after all that has occurred here and after all that you've sat through that would make any difference or have any bearing, any influence on your decision. And I say that because you have been painstaking in the care that you've devoted to this matter. It's been a long case, and I think that what we now face is what this case, in a sense, was always heading towards from its very inception.

I say that for a lot of reasons.

This case has had a lot of publicity, and I think that for that reason you, as a judge, sitting where you now sit, making the decision you're about to make, have to be aware of the community sentiment, and I think that's a factor that we need to talk about and address. We also, I think, however, to be fair, need to lay aside, if you will, that outrage that the community has experienced, that the community I think, no doubt, feels. Because what we're about to do is embark upon a life-and-death decision for two young men whose lives have been fraught with tragedy, unknown tragedy in a real sense. Their lives were unknown to this community and their backgrounds probably in large measure remains so because what stands out in terms of the community's understanding of what happened is that on January 7, 1982, a man was killed, a woman was seriously injured and a community was set in turmoil. And I think it would be hard, quite frankly, to completely disregard any consideration of that, but I think that in the last analysis we must.

When I say that we've been heading towards this question ever since this trial began, I say that not because of the nature of the charge but because of the nature of the evidence. There's no question that this crime occurred. Every killing is senseless in every respect, and so it's hard to weigh the factors that I think the statute outlines to you.

But I think more importantly and more fundamentally at this point in time rather than at the trial a legal principle comes into play for my client and I think for my client alone that I want to talk to you about and that is the question of the presumption of innocence. And you may wonder why after all of this trial and all of the proceedings that we've had I come to talk to you about the question of the presumption of innocence because I think the community probably thinks that that has been taken away from my client by reason of the jury verdict, but it has not. It has not for one simple reason, and that is that the verdict that was returned in this case was a verdict, a general verdict on the question of first-degree murder.

And so unresolved, until you alone make a decision, is the question of who did the killing; and that's the question that -- I think the tough question that you face in the next 24 hours as you ponder this matter. The presumption of innocence, Your Honor, is a declaration of neutrality that my client carries in even at this point to these proceedings; and I suppose what it means is that he stands before you until you make your mind up about whether or not beyond a reasonable doubt

Walter LaGrand was a participant, an active participant in this killing, that he is not guilty of an offense for which he must die. And only you make that decision, and as Mr. Alfred tells you, Your Honor, that is not a decision that is by any means automatic. It requires you to consider the evidence, to weigh the evidence and come to a conclusion on your own.

I think that the question of the presumption of innocence has to remind the community as well as you, Your Honor, that punishment, especially this punishment, is a serious matter. And what is the evidence that Mr. Alfred proposes to you should support your conclusion beyond any reasonable doubt, beyond -- so that you have some moral conviction or certitude that my client did a killing? What is that evidence? The evidence, Your Honor, comes from one person on the State's side and that is Dawn Lopez, a person whom everybody in this community and certainly on this side of the counsel table has to feel great sympathy for. And as you know, you instruct juries at the beginning of the trial and at the end of the trial you don't decide questions of guilt or innocence on sympathy.

Looking coldly at what she had to tell you, Your Honor, about this crime, I submit to you that you cannot find beyond a reasonable doubt that Walter

LaGrand was in that room when Mr. Hartsock was stabbed to death. He was outside, as he told you he was, trying to get away from a bungled, botched job, a job -- a series of crimes for which you are entitled to mete out a very extensive sentence, and I submit to you that that, if Mr. Alfred has a concern and the community has a concern about whether my client will ever walk the streets of Tucson or in the State of Arizona again, can be resolved against him. So that seems to me not to be the central question for your decision but whether retribution on my client shall be had, and I submit to you that the evidence doesn't support it.

I have outlined to you in careful detail the testimony of Dawn Lopez, and I think to sum it all up there's only one thing that Dawn Lopez says with any certainty about the act in question and that is that my client was present in the room. And you'll remember -- and Mr. Alfred cited to you her exact words and those words, you'll recall, were words that Mr. Alfred asked her, questions he asked her after I had cross-examined her and Mr. Gerson had cross-examined her extensively regarding the things she didn't remember, and that list is very long. And she said to you -- or said to Mr. Alfred, yeah, there's one thing I'm sure of in that there were two people in that room. That phrase, there's one thing I'm sure of, brings to mind something else that I think the Court has to consider in rendering a decision about this and that is whether you can place any confidence in the certitude that that woman has regarding what she remembers about only a very small portion of that event. Because you'll remember that the one thing she can't remember and has no recollection of at all is the thing that happened immediately preceding that event and that is, critically, the phone call from Kenneth Botkin, the young man who was called as my witness who came in here and said that he called into that bank on the morning of January 7th, 1982, and talked to Dawn Lopez and had an extended -- not an extended but at least some exchange of words with Dawn Lopez about what was going on in that bank. And he told you what those exchange of words were, and Dawn Lopez has no recollection of that phone call at all, and it is after that phone call, the evidence establishes, that this crime, this murder takes place.

And I ask you, Your Honor, can you reasonably rely on the word of a person who I am sure thinks she is recalling these events correctly, but who also acknowledges candidly under oath that she does not remember the events that preceded. That says something about her state of mind to you, Your Honor. That says something to you about the degree of terror she was experiencing and the degree of fear that she had. And we know from what we are told by the expert that is uncontroverted in this case, Dr. Loftus, that that kind of fear has an impact. That kind of trauma has an impact, an adverse impact on one's ability to recall events. And so in that sense the testimony of Dr. Loftus, both before the jury heard it and at the time the jury heard it, is more relevant now because of the nature of the felony murder rule than it was when it was given to the jury. It is relevant now because it calls into question on a scientific basis because of the psychological evidence that we presented that Dawn Lopez's recall of those events may well be defective for reasons beyond her control and for reasons that are completely understandable.

If that is the case, Your Honor, and if you apply the question of the presumption of innocence, that standard to those facts, I submit to you that you have reason to doubt whether or not Dawn Lopez's version of events can be relied upon to understand this case. But I don't have to argue only what she says to you to convince you or to argue Dr. Loftus to convince you, Your Honor, that that is the case. Because there is physical evidence in this case which supports the testimony that was heard on how this incident happened, and I think that's a critical thing to remember.

There is no question, I do not think, on the subject of how this crime occurred, why the stabbing occurred, putting aside the question of who did it. Mr. Hartsock kicked someone. Dawn Lopez tells you that, and that it is after that kick that a scuffle ensues, that Mr. Hartsock is stabbed and that Dawn Lopez is stabbed. On that question there is the bruise on Karl's leg to verify that that act took place, and it verifies that there was a scuffle. On that question you also have Karl's confession, Walter's testimony, the physical evidence and the letters that Karl and Walter have given you.

And so I come to probably the most difficult part of the argument that I have in terms of my client's relationship to his brother and that is positing to you the question, Your Honor, as to whether or not justice in this case means distinguishing the death penalty for my client from that of his brother. And in that regard, I ask you, Your Honor, what reasonable expectation -- or explanation can be given by the State for Karl's confession if it wasn't true? Karl has told the police when he was arrested on the night in question that he did this crime alone. He told the police that he panicked. He told the police that when the panic occurred and Mr. Hartsock was--kicked he reached for the letter opener and he repeatedly stabbed Mr. Hartsock and he stabbed Dawn Lopez.

You've heard that tape. You've heard the emotion that that man expressed to Detective Barkman, and that was not phony evidence. That was the confession in the truest sense of the word. The confession of the man who is getting something off his chest and playing it straight about what happened. If he was faking it, he wouldn't be gasping, he wouldn't be crying, he wouldn't be panting, he wouldn't be in the state of agitation that he so obviously was in. He was telling the truth and the truth hurt, and the truth is tough to deal with from his point of view, but it is the truth.

And when you put that on this mythical scale that I guess you have to do in weighing the evidence in this case, it seems to me that that tips quite heavily on the question of whether or not Walter LaGrand participated in this crime and leading one to the conclusion that he did not or that at minimum there is substantial doubt as to whether he did participate in the killing.

That is the case, Your Honor. The State has nothing to offer you besides Dawn Lopez. The State has not cited to you any other evidence in its memorandum to support the verdict that they ask you to render, and I submit to you that the failure to be able to prove that is their responsibility, and the responsibility of the State having not been met, the verdict that you have to render under Enmund seems to me only to lead to the conclusion that you can't find beyond a reasonable doubt that Karl -- that Walter did the killing, participated in the killing or planned the killing.

On the subject of planning the killing, there is an argument that Mr. Alfred addresses citing a supplemental opinion of the Arizona Supreme Court for the proposition that if Walter didn't in fact do the killing then he at least intended it, and I submit that that case doesn't go as far as the prosecution would like. For the intention under Enmund, I submit to you, has to be the specif intention to see to it that the man, the victim in question dies by the thought processes or the involvement of the defendant in question; and if you accept what Karl and Walter say about what happened that night, number one, there was absolutely no premeditation at all in this case; and, number two, whatever the state of mind of Karl LaGrand when this crime occurred Walter LaGrand didn't tell him what to do, didn't ask him to do anything. All Walter was trying to do was get out of there, and that's not good enough under Enmund. You have to, in my client's case, reach the decision, which is, unfortunately, easier for the State in Karl's case, about who participated in this crime; and if you make that decision adverse to my client, then I think you have to address the question of whether or not the aggravating circumstances are not outweighed by the mitigation and that after all is said and done the death penalty is the only appropriate sanction.

I'm not going to dwell at any length on the subject of the aggravating circumstances because I honestly don't feel that in my client's case those questions are reached because of Enmund, but let me say to you, Your Honor, that this crime when you step back from it and analyze it dispassionately and disregard the questions of what happened to the Marana sheriff and to the news media and the early release of Walter LaGrand and all those other factors that have brought outrage and concern on the part of this community, and you simply look at how this crime happened, in that isolation, it was not premeditated. It was not done with anything other than a state of panic, and that is not the kind of case that is contemplated to require the imposition of the most serious sanction that you as a Judge and this State as the executive branch of our government can impose on a citizen. And for those reasons, Your Honor, I'm asking, I'm requesting this Court not to impose the death penalty on

Walter LaGrand.

I'm going to join in Mr. Gerson's comments on the disputation of the mitigating versus aggravating circumstances and let him argue his motion.

THE COURT: All right. Mr. Gerson.

MR. GERSON: If it please the Court, obviously I join in the comments that Mr. Burke made insofar as reciting the inconsistencies of Dawn Lopez's testimony and his opinions as to her -- the weight that the Court should give to her version of the events. I don't takeanyposition one way or the other regarding his arguments about Enmund.

There's only been one issue in this case as far as Karl LaGrand has been concerned from Day One when Mr. Higgins had the case, when I got in the case, and that was what would be the sentence that Karl LaGrand would face. Would he do life in prison or would the death penalty be imposed? There's really been no other question. Karl LaGrand has never at any point said anything other than what is consistent with his confession that he made on the night of the incident. The attorneys have taken many positions, jockeying in pretrial motions and whatnot and have said a lot of things, but the Court's I'm sure well aware that that's our right and almost our obligation; but Karl LaGrand's position has always been the same. He confessed that day. I think the confession of Karl LaGrand is the single most important piece of evidence in this case, and that confession has always had me personally in a bit of a catch-22 situation or in an awkward position.

If the Court will recall, the Court suppressed the confession and said that it was involuntary, and I came back and stipulated that it was voluntary but that it was in violation of Miranda. It has always been our position that the confession of Karl LaGrand on the night that he confessed to Weaver Barkman is the absolute truth as to what happened that morning in Marana and that it's the best evidence as to what happened in Marana, as to Karl LaGrand's state of mind, his intentions, his purpose and his feelings about the incident in Marana. I think when you listen to the confession, which the Court has done on a number of occasions, and you listen to it, there can be no doubt in anybody's mind but that Karl LaGrand is telling the truth. He is -- it is an emotional confession. He is crying. He is upset. We heard the testimony from Dr. Meshorer as to hyperventilating, the coughing, the crying, the extreme anxiety. I think there can be little doubt that Karl was just getting what he could off his chest.

If the Court will recall, Weaver Barkman went on for -- I forget how long. He could have gotten

Karl LaGrand to confess to almost anything that day, but Karl was telling him the truth. He was telling him what happened. Weaver Barkman asked him innumerable times was Walter in the room. Karl always maintained no; it was an accident; I panicked; I didn't mean to do it. And, again, Your Honor, I'm almost put in a position where I have to prove that my client did it and did it alone in order to convince this Court that it was not the act of two people killing one person, one person holding him, the other person stabbing him, as Dawn Lopez would like the Court to believe.

I think Mr. Burke has given, you know, ample argument as to why her testimony is just -- it's not consistent with the facts. If the Court will recall -- you've read the letter from Karl LaGrand which is the only testimony given, other than Dawn Lopez, as to what actually happened inside that room. The Court will recall it's a small room. There's furniture. At the time that the actual stabbing took place there's three people in there, and Karl says in his letter that he's up against the desk, Mr. Hartsock's desk. He's leaning against it. He said he's got his feet crossed. He's standing there and he's looking at Ken Hartsock. Dawn Lopez is in the corner. She's crying. She's facing the corner. At that moment -- and this is consistent with all the evidence in the case -- Ken Hartsock -- Walter LaGrand's out of the room. Ken Hartsock is sitting there. It's easy to imagine that he thinks he's going to be shot. He's been threatened repeatedly throughout in that course of ten or 15 minutes that he's going to be shot, that he's going to be wasted, that he's going to be killed. And it's easy to imagine how he could think he's going to die anyway, and so he sees Walter LaGrand is out of the room, and he takes his best shot at Karl, and he kicks him. And there's testimony that is uncontroverted that Karl was kicked. Dawn says that someone was kicked, and as Karl says, at that point he reached over and he grabbed the knife and he started swinging.

If the Court will recall the testimony of Dr. Byers, the pathologist, all of the knife wounds, with the exception of one, possibly, went from what would be Mr. Hartsock's right -- I believe it's right to left. They are all consistent with Karl coming like this and stabbing him, with Ken Hartsock sitting in the chair, standing up and kicking him, all the wounds are consistent that they go that way. They would not be consistent if Karl was kicked for him to reach over, grab Ken Hartsock, spin him around and then Walter stabbing him.

Now, Dawn Lopez was standing over in the corner -- sitting in her chair. She turns around to see what's going on and does what anybody would do in that situation. She was crawling along the wall to get between the desk and Karl, and her wounds are consistent with the same thing, Karl going after her. The way the physical evidence goes it is consistent with Karl's version of what happened. Everything about his story is consistent with the physical evidence. It is consistent and has been consistent with what little Walter has to say. Walter doesn't know what went on, but the angle of the wounds -- it would almost be impossible to stab someone that many times if somebody was holding them. The wounds would be considerably deeper.

We have a panicked person and Karl acting alone in a state of panic. We have Dawn Lopez trying to say that Walter comes in or somebody says, "Make sure he's dead." Well, Walter's testimony -- and it's consistent and it makes sense -- he walks in and says, "Is he dead?" not, "Make sure he's dead," but, "Is he dead?" He says it a couple of times. If they're going to say -- if he's going to say, "Make sure he's dead," the only purpose in doing that would be so there would be no witnesses; and if they're going to do that, why would they not -- why would they leave Dawn Lopez? It just doesn't make sense that they would be maliciously out to stab Ken Hartsock so that -- the only reason being for no witnesses and then leave

Dawn Lopez just laying there with no concern for her.

I think all the facts as stated by Karl and what can be verified by Walter show that Karl was acting alone and he did so in a state of panic. Again, you listen to the confession. He keeps saying it. "I didn't mean to do it. It just happened. I panicked." If these -- if Karl and Walter were intent on killing somebody when they went in there, there's no reason for them to take a fake gun. They went out of their way to make -- to make it so that nobody would get hurt. Their whole purpose there with the fake gun was to scare Ken Hartsock into opening the safe. They threatened to shoot him a number of times. There's no doubt they couldn't have shot him. They wanted to scare him. They did a good job on that.

As the Court knows, every killing does not require the death penalty. I think the Court can also say that what we have here is a felony murder. I think it would be stretching the facts for the Court to presume that the jury came in with a premeditated murder verdict. We have a felony murder situation here.

In going through the aggravating and mitigating factors, that the State has alleged 13-703(F)(2) prior felony convictions with the threat or use of violence. Your Honor, I would submit that that is a factor that the Court has put there. There's no way we can argue that it shouldn't be there, and it's something the Court can take into consideration. However, I think the weight that is given to prior felonies should be a very, very small amount of weight, especially prior felonies where there has been no violence to anyone. The prior convictions by both Karl and Walter are for the use of a deadly weapon. There has been no indication that anyone was injured, and it's a factor that the Court can consider, but I would think a sad commentary when someone can be given the death penalty because they have prior convictions.

(F)(3), putting someone in a grave risk of death to a person other than the victim. In this case I think the evidence before the Court is that Karl and Walter went out of their way not to hurt anybody. They didn't intend to stab anybody. They didn't intend to hurt anybody. They went in with a fake gun. That if they had wanted to kill Dawn Lopez, if that had been their intention, they could have easily done it. Again, this is an aggravating factor. The Court can find that Dawn Lopez was put in grave risk, but it's all part of the same incident where Karl LaGrand is panicky. He's scared. I think it's safe to assume that she was crying, that she was screaming. She had just witnessed something that is, hopefully, more horrible than anything any of us will ever have to witness, but nonetheless, there was never any intention to kill her. There was no intention to kill Ken Hartsock, and all the actions of the defendants -- the fake gun, the scanner -- everything is done to scare them, to get them to open the safe. That's all they wanted. They had no intention to kill anybody. I think the evidence is just clear as can be that there was no intention walking in that anybody get hurt.

(F)(5) basically is the -- that it was done for some sort of pecuniary gain. Now, the cases all say that does not mean it's got to be where you're paid money to go kill somebody, but the cases -- the cases all talk about that the reason -- they didn't kill someone to get their money. They went in to rob the bank and an unfortunate event that happened -- was that someone was killed, and there are cases that talk about cause, not the result. You can't just look at the result, that they went in the bank and someone died, therefore they killed someone for pecuniary gain. The cases talk about that you had to commit the murder for financial motivations.

Well, the only motivation we have before the Court is that Karl LaGrand killed Ken Hartsock in a panic, in a fear because he was being attacked.

Now, it's -- none of these things are excuses or justifications for killing Ken Hartsock. We're only talking about one issue here and that is should Karl

LaGrand be sentenced to die or should he be given a term in prison. I don't mean any of this to sound like an excuse or justification for his actions. There is no excuse. There is no justification. So we have to look to the cases. Because every killing is bad. Every killing is senseless and every -- you can't have -- and in almost every felony murder situation it's as a result of some sort of stealing property or robbing someone. It's something done for money. I think the vast majority of felony murder cases are robberies that something goes wrong, from -- whether someone has a heart attack or someone is shot that was -- you know, one of the defendants didn't even know the person had a gun. But it has -- you have to look to the reasons that the killing happened, not just the killing happened, and the cases talk about cause versus result, that you commit it for a financial motivation. There's no evidence before the Court that Ken Hartsock was killed to make the robbery any easier. The evidence is quite to the contrary, that they didn't intend to kill him.

The final factor the Court -- that Mr. Alfred has alleged is that the crime was done in a heinous, cruel or depraved manner. Now, Your Honor, the cases are very clear that heinous and depraved go to the mental state or attitude of the defendant, and I think from the confession of Karl LaGrand it's very clear that there was no intention on his part to harm anybody; that he didn't mean to hurt anybody and it's the mental state or attitude of the defendant as reflected in his words and actions.

Again, I think what's so important is the scanner, the fake gun. They tied them up to keep them out of the way. Everything was done to scare them but not to harm them. So I think in this case it's not a heinous or depraved crime because if you look at Karl LaGrand's mental state there's no way you can find he had any specific intent to harm anyone.

The third factor in there is that it's done in a cruel manner, and the cases all turn on was there a great deal of pain and suffering done by the deceased. In this case Ken Hartsock, according to Dr. Byers, had four or five stab wounds, all of which were fatal. That it's not the quantity of the stab wounds that count. If you stab someone one time and kept your knife as a -- torture murders, that's what they talk about as cruel. Ken -- the cases go on where someone died instantly and then the body was mutilated afterwards. The courts found that's not cruel under this aggravating factor because the deceased didn't suffer.

In this case Ken Hartsock died quickly. There's no evidence that there was any malicious -- there was any, what is called, gratuitous violence. There's a great number of stab wounds. I think that those -- is not evidence of gratuitous violence towards Mr. Hartsock but a frenzy and a panic on the part of Karl LaGrand. There was -- he was kicked and he acted. There wasn't reflection. It's not where -- cases where people have shot someone, walked outside, come back in and shot them again. I think all the evidence shows that Ken Hartsock died quickly; that there was no intent to cause pain and suffering by Karl LaGrand.

And the cases are clear that for cruel it must be pain -- it can be mental suffering as well as physical suffering and it's got -- the crime has to be committed in a way that that is the intention. And I think the evidence that the Court has before it now with the confession and the statements of Karl and the letters he's wrote -- has written to the Court, that it all happened very quickly. The time frame -- the Court will remember back to the trial, we have a period of maybe ten minutes going on here where everything happened and maybe a period of 20, 30, 40 seconds where the stabbing has happened, a minute.

I think these aggravating factors when you look at them on the surface as Mr. Alfred, you know, talks about them, you can find that they're present. But when you really look into how they fit to the facts and circumstances as the case sits now, the posture of the case or the evidence before the Court, you'd find that even if you want to say they are present they are not present in an amount sufficient to outweigh the mitigating factors.

And I think one of the most important mitigating factors -- and as the Court is aware, there are a number of them listed and then basically the Court should and must consider any other factor which it deems important -- a very important factor obviously is the age of both -- the age of my client. He'd just turned 18 at the time of the event. That's a factor which is specifically listed, (G)(5).

I think also 13-703(G)(4) is applicable in this situation because I don't think that either of these defendants, and especially Karl, could foresee that what -- the events that happened were likely to happen once they got there. I don't think they could foresee that he -- Karl would be left alone, that Ken Hartsock would panic and that Karl would be standing in a position where he could grab a letter opener. It was not reasonably foreseeable that someone could get hurt. Again, the fake gun, the scanner. Everything was -- every effort was made for just the opposite, that no one would get hurt.

Another mitigating factor, 13-703(G)(1), has to do with the ability or capacity to appreciate the wrongfulness of their crime. I think there's no doubt that Karl and Walter both knew that robbing a bank was wrong, and as Mr. Burke said, there was a crime for which the Court can punish them and has a right to punish them. But I don't think under the situation as it exists now, as we know happened, that Karl had the capacity to appreciate the wrongfulness of his act. He knew he shouldn't kill Ken Hartsock, but under the pressures of the moment there, in the small room, alone with two people in a highly emotional situation, Karl did not have the time once he was kicked to sit down and reflect. In fact, if he did, that would be an argument, well, now -- maybe why the Court should impose the death penalty. But there wasn't time, and in the highly emotional, excited situation that existed Karl just reacted and he panicked and was not given time to think about his acts.

Other mitigating factors -- one that the case law talks about is the fact that felony murder instructions are given. While it's a fact -- if a felony murder instruction is given that shows any doubt as to the specific intent of the parties, and I think that is applicable here. I think it's -- it seems obvious to me that the jury came back with a felony murder instruction.

There was no evidence to show that there was any premeditation, and I think there's a great deal of doubt as to the specific intent of Karl LaGrand. In fact, I think there is no doubt that he specifically intended not to hurt someone but was a victim of the circumstances. Again, these are circumstances that he created. These are not justifications. They're not defenses to the crime. They only go to -- you know, is there a penalty other than the death penalty that's more appropriate in this situation.

Another factor which the courts have commented on is the intent in planning the crime. Again, as I said, they took a fake gun; they threatened to shoot them. All they wanted to do was to scare them. There was never any intent when the crime was planned that anybody would get hurt.

Finally, I think an important thing is the character of Karl LaGrand, his state of mind, as the Court sees it, and I think from the confession, from what he said his state of mind at the time was there was no intent to harm anybody. In fact, he's shown a lot -- I think his confession, as well as his letter to the Court, has shown a great deal of remorse. It's something obviously if he could turn around he would, but that, unfortunately, is something that, you know, him nor the Court can do.

As to the character of Karl LaGrand, you have to look at the circumstance of the offense, his state of mind at the time, his remorse after, his planning, his family background, all the things that are before the Court which show the Court should weigh and take into account.

An important factor which the Court can take into account is the propensities of the defendants -- and it would be hard to argue that they don't have a propensity for committing crimes -- but you could argue easily -- and I submit to the Court -- that they don't have a propensity towards violence. They've used weapons, but they've never done physical harm to anybody. And there's been no evidence presented to show that they -- they're a threat in the future should the Court give them -- if they get out of jail in 60, 70 years from now, that they'll pose a threat to society. The only threat they are to society if they were out they would commit burglaries or robberies, and the Court can easily protect society from that. The options to the Court are -- range from 25 years concurrent with what the time they're serving now to, I think, it's a hundred and something consecutive to what they're serving now. So there's no propensity towards violence or to harm.

There are cases cited under the sentencing statute where people have previously been convicted of murder and this is their second -- they're up for trial for a subsequent murder. Those are the kinds of felonies, you know, a violent assault, a previous murder, that are felonies that should be taken into account and something that shows propensity on the part of the defendant and part of the defendant's character.

None of that is present here. I think when the Court looks at the situation and listens to Karl's confession, which I submit is the most important thing we have to go on at this point, and looks at the aggravating and mitigating circumstances, it will find -- it can only find that the mitigating circumstances greatly outweigh the aggravating circumstances, and if not in number but in the -- in the weight that should be given to each one of them, and none of us know the formula the Court should apply in deciding how much weight to give each one of these things. It's at the discretion of the Court, and I would urge the Court that the things that are most important are the mitigating factors. The aggravating factors, a number of them, are present in almost every killing, that the Court can hang its hat on, so to speak, if it's desiring to sentence someone to the death penalty. But that the mitigating factors is what the Court should really look at and what the -- the Supreme Court seems to be saying is there -- what shows us that a sentence other than the death penalty should be imposed. And in this case I think all the things that I've said, plus what Mr. Burke has said, show that the sentence that should be imposed which fits the circumstances when you look at this rationally and logically with all the emotion gone from it is that these -- at least Karl LaGrand should be sentenced to a term of imprisonment, a lengthy term, but that he's not -- but a term -- a sentence of death in the gas chamber is just not appropriate. Thank you.

THE COURT: Mr. Alfred.

MR. ALFRED: Your Honor, I guess, as in all cases, I do have a right of rebuttal, and I guess I'll take it briefly. I would like to respond to a couple of things that were said.

Mr. Burke in his argument said that the State has nothing to offer but Dawn Lopez. Well, in a sense that's true, and we're probably fortunate to have had Dawn. Fortunately she survived. The Court heard her testify, and I think it was apparent to everyone that she was a very courageous young woman and that she was a very credible witness.

As the Court well knows, a long period, a 25-month period passed between the crime and the trial; and during that period of time, Dawn Lopez was interviewed more times than I can remember by -- not only by police but by various defense attorneys involved in this case. Dawn was sure throughout this 25-month period of a couple of things -- she was sure of a lot of things -- but two things stand out here: that there were two men in that office when Ken Hartsock was killed, and that she was attacked by the individual whom she used to refer to as the Mexican man, who's Walter LaGrand. She has never at any time that I can recall said that it was anyone other than Walter LaGrand that attacked her in that office.

Mr. Burke says we shouldn't believe her. That's what it comes down to. Are we going to believe Dawn Lopez or aren't we, and that's for the Court to decide. Mr. Burke says we shouldn't believe her at least on these points because she was under stress and because Dr. Loftus says that because she was under stress we shouldn't believe her; that her recollection is incorrect and also because she cannot remember specifically a phone call from Kenny Botkin, although she can specifically remember other phone calls that she got from Wilma Rogers while this incident was taking place. And I recall she also testified that there were numerous phone calls to that bank following the murder after Walter and Karl LaGrand had fled, but she does not specifically remember the phone call from Kenny Botkin. However, this and Dr.

Loftus telling us that because she was under stress at this time for these reasons we should not believe her.

Dr. Loftus presented his conclusions and his reasons for his conclusions, and I really have no comment on them other than the fact is well known to the Court in cases tried almost every day you find experts on every side of every issue, and I'm sure I'm not going to say Dr. Loftus's testimony should not be considered by the Court. It certainly should. The Court can give it whatever weight the Court considers it deserves. However, I would ask the Court to consider carefully Dawn Lopez and the way she testified and the way she appeared and what happened to her that day and what she has said throughout the 25-month period between the crime and the trial that occurred that day in that office.

And also I would like the Court to consider something else. Mr. Burke said we have nothing to offer but the statements of Dawn Lopez. We also had something else that I thought was very persuasive and I think the jury thought was very persuasive and that was the way in which Ken Hartsock was killed. And I would like the Court to think about that and review the evidence showing the number of wounds that Ken Hartsock had and the location of the wounds on Ken Hartsock's body. Compare those, for instance, with the location of the wounds on

Dawn Lopez's body and think about what a person in Ken Hartsock's situation is going to do when he's attacked in the way that Ken Hartsock was attacked and look at the location of the wounds on Ken Hartsock's body and note how they're all located on the front, around the throat and down the frontal chest. Look at the location of the wounds on Dawn Lopez's body, how they're all down her side. And think about what a person is going to do, particularly a person who's being attacked by one individual when one individual begins to stab them. Are they going to be wounded in such a way throughout 26 wounds that the wounds are all frontal? Are they going to protect themselves? Are they going to turn, as Dawn Lopez did?

The State submits to you the more reasonable response for any individual in that kind of a situation is to do as Dawn Lopez did and that is turn one's body, turn to protect the vital organs, especially when one knows that they're being attacked. Ken Hartsock did not do this. The position of Ken Hartsock's body and the location of the wounds on his body are exactly in conformity with the way in which Dawn Lopez said he was attacked, one person holding him from behind and another person stabbing him.

I submit to you, Your Honor, that that is not only the way that this occurred -- and the Court can see that from the physical evidence and from the testimony -- it also adds great credibility to what Dawn Lopez said concerning the killing itself and concerning everything that happened at the bank that day.

Finally, Mr. Burke brought up this case of Enmund vs. Florida which was adopted by our Supreme Court in State vs. McDaniel which makes a requirement upon the trial court in order to impose a sentence of death in a felony murder situation that the Court must make a finding beyond a reasonable doubt that the defendant either killed, attempted to kill or intended to kill.

The case I cited to you in my memorandum and that Mr. Burke made reference to is a very recent Arizona Supreme Court opinion, State vs. Emery, which was filed on June the 6th of 1984, and at the time of writing my memorandum all I had was a Supreme Court number for you. They expanded on this somewhat and said in that opinion "We wish to make clear" -- this is quoting from Emery -- "We wish to make clear that intended to kill encompasses the situation where a defendant contemplated, anticipated or intended that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony."

Well, if I understand Mr. Burke's argument right, he is saying that the case does not in any way extend to McDaniel. Well, it doesn't. The fact still remains that the finding that McDaniel requires you to make still exists. What they are doing is Emery is providing you with some guidance as to what "intended to kill" means, and that's what that paragraph that I just quoted states. And you are to take that paragraph and decide, well, how does it apply to the facts of this case. Well, what does it mean when someone says, "If you can't open it at this time, let's just waste them and leave"? What does it mean when someone says while holding a steak knife, a letter opener, whatever it was, to someone's throat, "If you're not telling the truth, we're going to kill you"?

I submit to the Court that what it means is that someone is contemplating, anticipating or intending that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony. And I say this by way of explanation to the Court of how that State vs. Emery case could be applied to the fact situation that we have here.

Your Honor, the fact situation in this case I think is clear. I think the aggravating situations in this case is clear, as are the mitigating circumstances that have been presented. I think the Court's duty in this case is clear, and I think the case law and the evidence clearly supports that the Court's duty in this case is to impose a sentence of death for the crime of first-degree murder, and I urge the Court to do so.

THE COURT: I'm not certain that now is the time to do it or not but I'll give them the opportunity. I want to know if either defendant has anything he wants to say to me now, or do you want to postpone it until the time of sentencing?

MR. GERSON: Your Honor, Karl LaGrand may make a statement Friday morning at the time of sentencing. He doesn't desire to do so today.

THE COURT: All right. How about your client, Mr. Burke? Would you rather defer it? I don't mean to preclude making a statement now and subsequently, too, for that matter. That's all right.

MR. BURKE: He's expressed a concern that you make a decision after he's expressed himself, and he's indicated a request to make a statement Friday, Your Honor.

THE COURT: All right. He can do it now, then or both. You understand that?

MR. BURKE: Yes, we do, and we'll do it Friday.

THE COURT: All right. Is there anything else that we should take up at this time?

MR. BURKE: I have nothing, Your Honor.

MR. GERSON: I have nothing, Your Honor.

THE COURT: You both received copies of the presentence report and supporting materials long since, haven't you?

MR. ALFRED: Yes, Your Honor.

MR. BURKE: Yes, Your Honor.

THE COURT: Mr. Gerson, you did, too, didn't you?

MR. GERSON: Yes.

THE COURT: All right. Of course there are things in there which parallel or duplicate what I've heard at the mitigation-aggravation hearing, and it also -- they, I guess I should say, the two presentence reports, also contain things which are not properly considered, I don't think, in determining the sentence as to the murder count, and I won't consider them as to that. There are some things in there, though, that I believe I -- let me say it this way. I believe I am required to consider the presentence report and supporting materials in determining the sentences as to the other counts.

Do you agree with that?

MR. ALFRED: Yes.

MR. BURKE: Yes, Your Honor.

MR. GERSON: Yes, Your Honor.

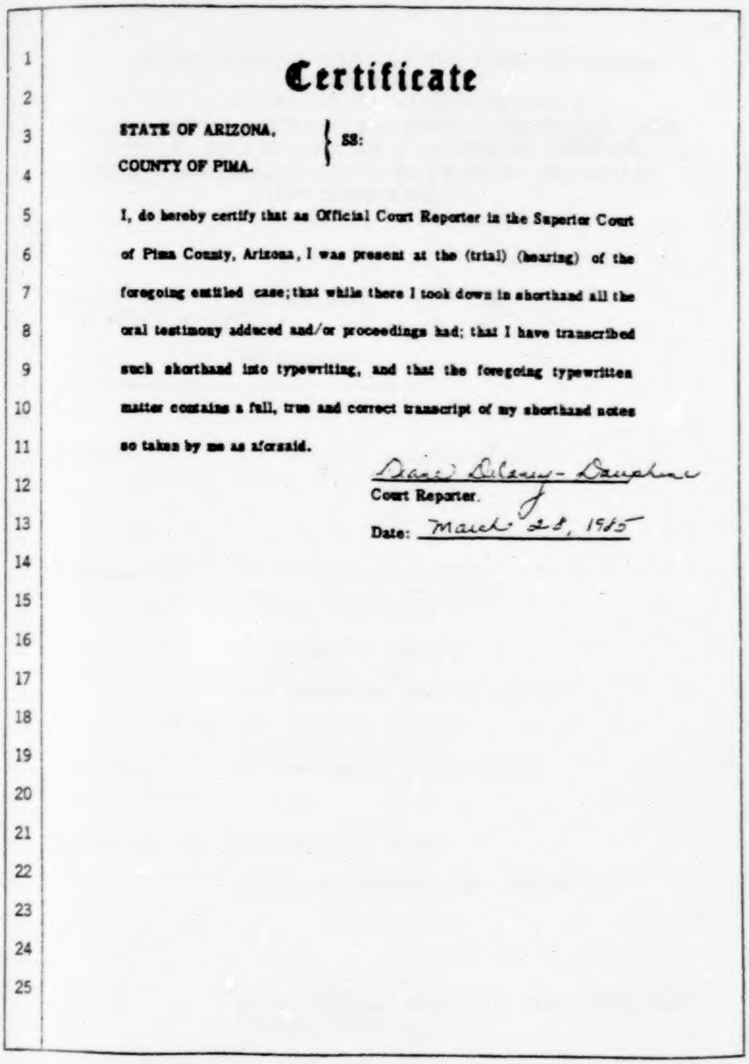
THE COURT: Now, there was one other thing which I believe was of concern to counsel and that is whether or not consecutive sentences could properly be imposed for these various counts, and from the legal authority that I have seen, I think that they can. Now, if anybody has any disagreement with that, why, you can tell me either now or later, but my present belief on reading the cases is that it is permissible. I'll just say that, for whatever it's worth, so you'll know what I'm thinking.

All right. Is that everything for now?

MR. ALFRED: Yes.

MR. BURKE: Yes, Your Honor.

THE COURT: All right. Thank you.



Certificate

STATE OF ARIZONA,
COUNTY OF PIMA. } **SS:**

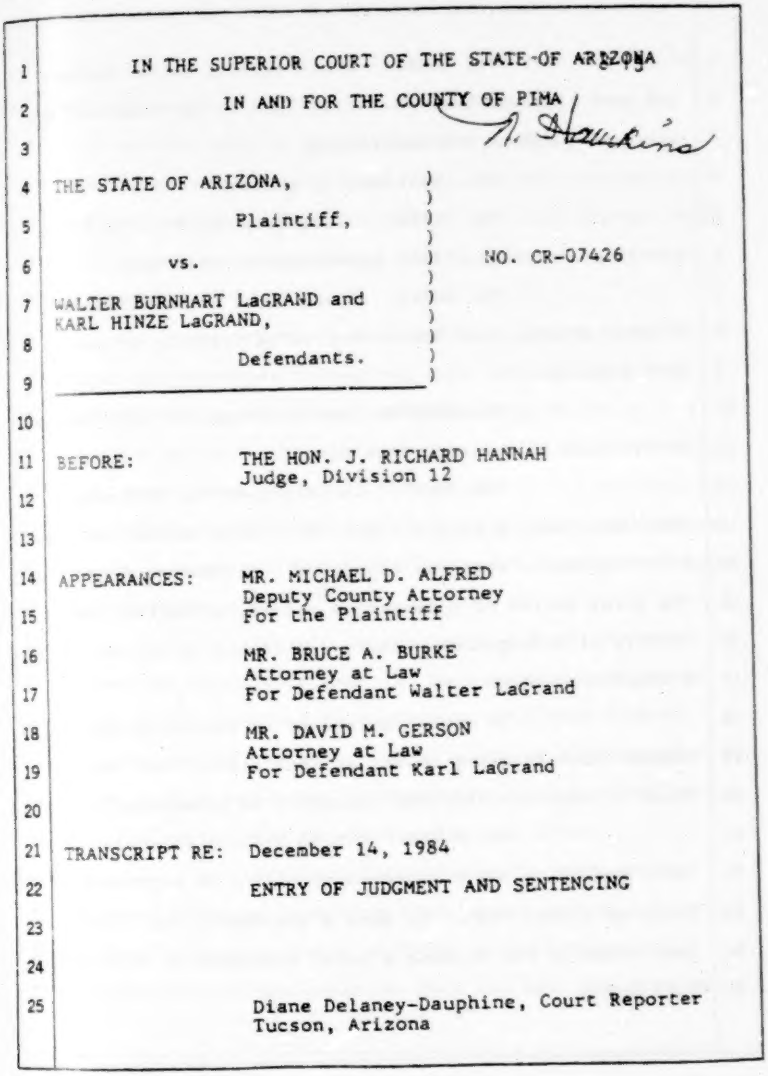
I, do hereby certify that as Official Court Reporter in the Superior Court of Pima County, Arizona, I was present at the (trial) (hearing) of the foregoing entitled case; that while there I took down in shorthand all the oral testimony adduced and/or proceedings had; that I have transcribed such shorthand into typewriting, and that the foregoing typewritten matter contains a full, true and correct transcript of my shorthand notes so taken by me as aforsaid.

Court Reporter.

Date: March 28, 1985

Annex MG 6

SUPERIOR COURT OF THE STATE OF ARIZONA, PIMA COUNTY, *THE STATE OF ARIZONA* V. *WALTER AND KARL LAGRAND*, TRANSCRIPT OF ENTRY OF JUDGMENT AND SENTENCING (14 DECEMBER 1984)



IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

A. Hawkins

THE STATE OF ARIZONA,
Plaintiff,

vs.

WALTER BURNHART LaGRAND and
KARL HINZE LaGRAND,
Defendants.

NO. CR-07426

BEFORE: THE HON. J. RICHARD HANNAH
Judge, Division 12

APPEARANCES:

MR. MICHAEL D. ALFRED
Deputy County Attorney
For the Plaintiff

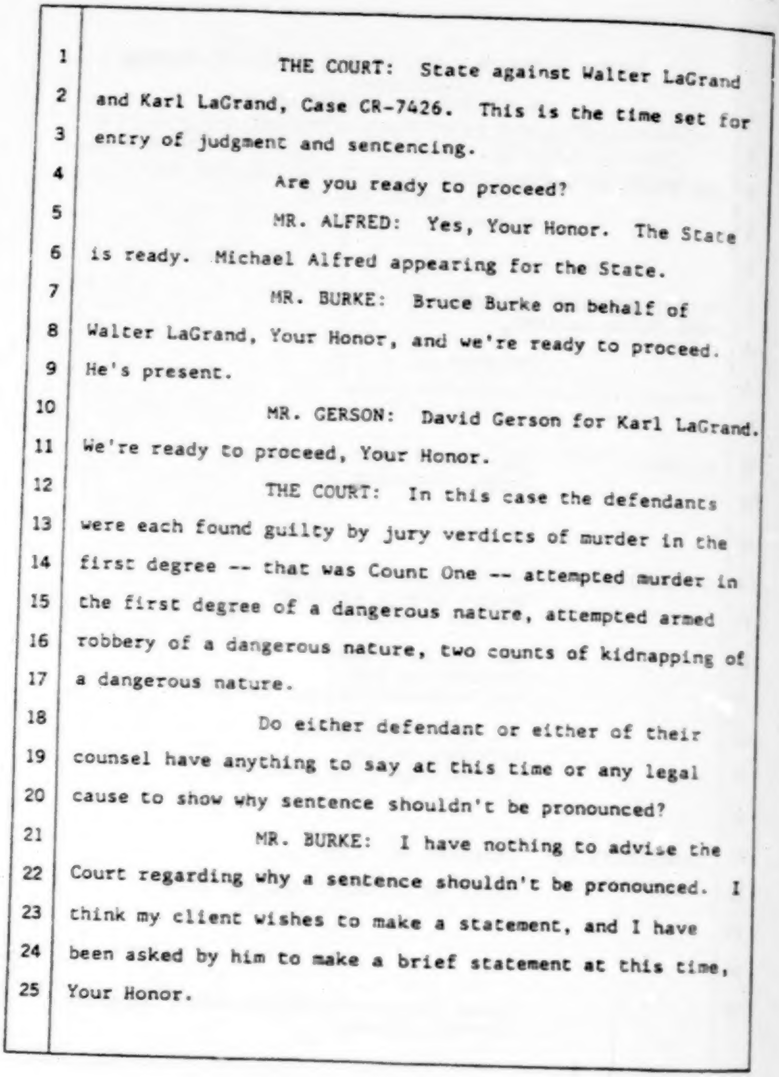
MR. BRUCE A. BURKE
Attorney at Law
For Defendant Walter LaGrand

MR. DAVID M. GERSON
Attorney at Law
For Defendant Karl LaGrand

TRANSCRIPT RE: December 14, 1984

ENTRY OF JUDGMENT AND SENTENCING

Diane Delaney-Dauphine, Court Reporter
Tucson, Arizona



THE COURT: State against Walter LaGrand and Karl LaGrand, Case CR-7426. This is the time set for entry of judgment and sentencing.

Are you ready to proceed?

MR. ALFRED: Yes, Your Honor. The State is ready. Michael Alfred appearing for the State.

MR. BURKE: Bruce Burke on behalf of Walter LaGrand, Your Honor, and we're ready to proceed. He's present.

MR. GERSON: David Gerson for Karl LaGrand. We're ready to proceed, Your Honor.

THE COURT: In this case the defendants were each found guilty by jury verdicts of murder in the first degree -- that was Count One -- attempted murder in the first degree of a dangerous nature, attempted armed robbery of a dangerous nature, two counts of kidnapping of a dangerous nature.

Do either defendant or either of their counsel have anything to say at this time or any legal cause to show why sentence shouldn't be pronounced?

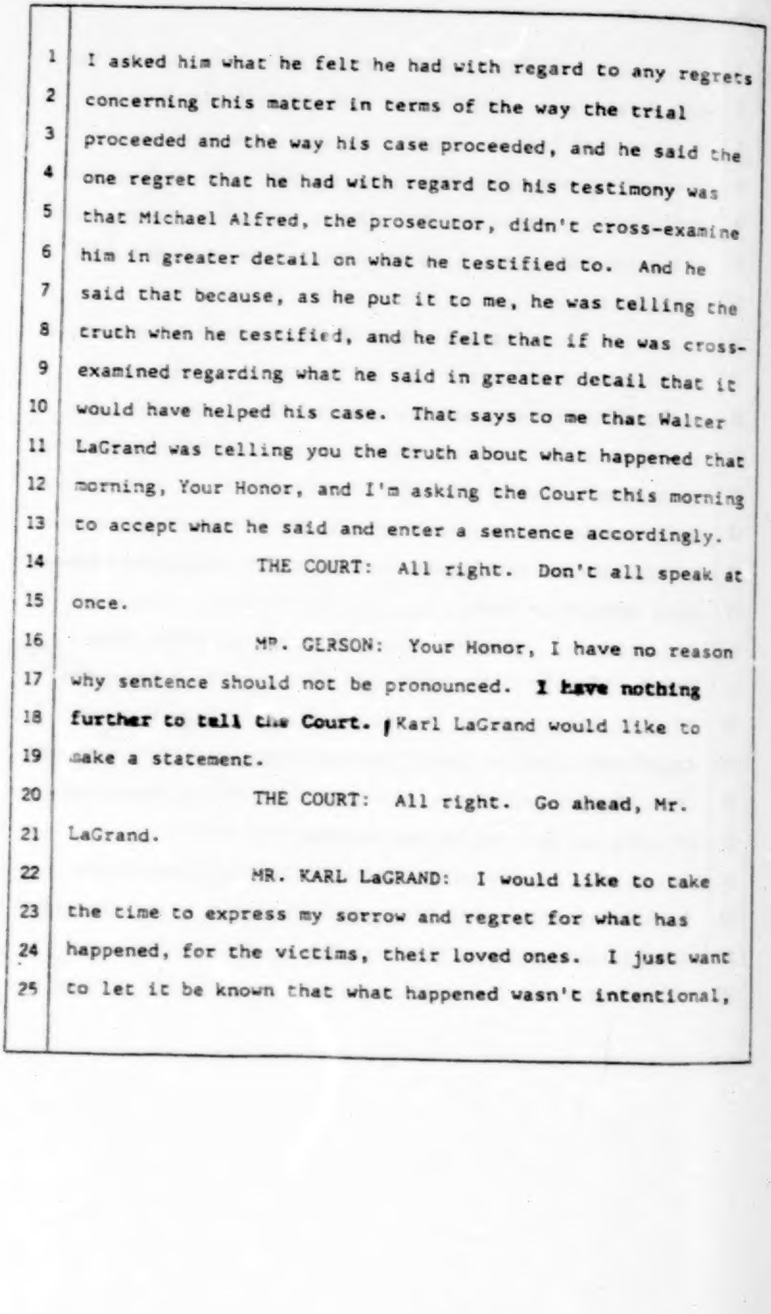
MR. BURKE: I have nothing to advise the Court regarding why a sentence shouldn't be pronounced. I think my client wishes to make a statement, and I have been asked by him to make a brief statement at this time, Your Honor.

Last night I spent some time with Walter out at the jail. Unlike the times previously when I visited with him, we weren't talking as much about the case as we were about his opinions and attitudes and his reflections on this matter. There are three things, with his permission, that I would like to advise you of this morning.

First is that Walter expressed to me last night and expresses through me this morning regret and remorse for the circumstances which bring him here, for the victims, and although he maintains and still maintains, Your Honor, that he didn't participate in the killing, he understands that at least indirectly by his participation in the robbery that those circumstances led to the tragedy that brought us here.

Second, addressing you directly, Your Honor, he understands that you have devoted a great deal of time and attention to this case, as I know from my experience that you have, and although he's disagreed with some of your decisions, he knows that you've worked hard at this matter, and he appreciates the effort.

Finally, I would like to bring to the Court's attention something that Walter told me last night that I think sums up his position in this matter and I think addresses the question that you face this morning.



I asked him what he felt he had with regard to any regrets concerning this matter in terms of the way the trial proceeded and the way his case proceeded, and he said the one regret that he had with regard to his testimony was that Michael Alfred, the prosecutor, didn't cross-examine him in greater detail on what he testified to. And he said that because, as he put it to me, he was telling the truth when he testified, and he felt that if he was cross-examined regarding what he said in greater detail that it would have helped his case. That says to me that Walter LaGrand was telling you the truth about what happened that morning, Your Honor, and I'm asking the Court this morning to accept what he said and enter a sentence accordingly.

THE COURT: All right. Don't all speak at once.

MR. GERSON: Your Honor, I have no reason why sentence should not be pronounced. **I have nothing further to tell the Court.** Karl LaGrand would like to make a statement.

THE COURT: All right. Go ahead, Mr. LaGrand.

MR. KARL LaGRAND: I would like to take the time to express my sorrow and regret for what has happened, for the victims, their loved ones. I just want to let it be known that what happened wasn't intentional, as you heard in my statements, what Mr. Alfred tried to present. It was just the thing out of the spur of the moment, and it wasn't nothing intentional. And I just hope that the Court can reflect on the evidence that was presented to him, and I just say that with sincerity and I really mean it. And I just ask that when you make your decision that you just not impose the death penalty. Just have mercy on my brother and my life. Just give us the sentence of life or something. Thank you.

THE COURT: Thank you.

Does the other defendant want to add anything to what his lawyer said?

MR. WALTER LaGRAND: Yes, I do, Your Honor.

First I do want to thank you for taking out your time. I also want to thank Bruce for his devoted time in this case. As far as I feel, he done a wonderful job in this case.

I'm going to have a lot more to say than my brother said today. I don't know where to start. I didn't prepare a speech for anybody -- anybody in here. I didn't prepare a strategy. What I am going to say come out of here (indicating) today because I'm not just fighting for my life. I'm fighting for my brother's life here today, too.

We've been heard how many people got hurt, for Dawn, a family that ain't got a father today, and yet I don't really think as far as the people that has been coming to this courtroom, as far as the prosecutor, I don't feel they really realize what we've been going through all these years. I feel there's been a lot of hate in this case, and this hate is so strong that the truth has been set aside. I feel the press -- I'm pretty sure they're here today -- has painted a picture of the LaGrand brothers, and they painted this picture and Michael Alfred has been using it as a stepping stool. I ask myself does he know Walter LaGrand or does he know Karl LaGrand? And the things I've heard him say about us there's been times I've wanted to jump up and say do you have the right case, Mike.

I listened to the jury. I've seen them come in here with books and newspapers. I've heard they sold newspapers downstairs while this was going on, and then I heard you ask them the question as far as have they heard about the LaGrand brothers, and I heard them say, no, we haven't heard too much.

The press they don't -- play a tape of Dawn Lopez on the day she called in for help. They thought they were just playing it for the society -- the citizens out in Tucson. That's the way they felt. They didn't know how I felt or my brother felt when we heard that tape and heard that lady cry for plea. They didn't know how we felt about this. They just going by the picture they painted.

I thought I wasn't going to make it in this courtroom today because I knew what to expect as far as how everybody going to feel today. I've been told not to make a long speech as far as --

THE COURT: Excuse me one second, Mr. LaGrand.

(Interruption)

THE COURT: Go ahead, Mr. LaGrand. Excuse me.

MR. WALTER LaGRAND: -- as far as, you know. I'm not a professional and it might hurt me for what I say, but I tell you right now I'm not here as far as putting something together what I'm going to say. There's going to be a lot of stuttering in my voice. There's going to be a lot of things. I'm going to take it all the way back to the day it started. Everything that's been said to all these people here today they going to know who Walter LaGrand is today as far as a human being and not what Michael Alfred talking about, a vicious killer, a murderer that don't have no respect for other humans' life.

I'm pretty sure everybody's been through a lot here during this whole -- during this whole trial.

I want to take myself back to the day it happened. Michael Alfred says -- excuse me -- Miss Lopez says that she saw Mr. Hartsock getting bear-hugged. He also said Wednesday, Michael Alfred, that he don't understand how Mr. Hartsock got stabbed all on one side. I can't tell you that. I can't tell this Court that because I wasn't in there. I can't explain exactly what happened right there because I wasn't in there, but what I can explain is on the way back from the freeway how my brother was crying, how he was breathing, how he kept telling the whole time how he didn't mean to do it and how he panicked. I also ask myself a question, too. If my brother bear-hugged Mr. Hartsock and I turned around and stabbed him, why didn't my brother get stabbed in the arms? Why didn't he get stabbed in the arms, if that's the way it happened? Then I listen to this tape my brother put in here -- I mean on that day and that they played for this Court. I listened to that interview, thinking names, Weaver Barkman. How he interviewed my brother. How he didn't care as a human being the emotional state my brother was going through. He used all his tricks, all his trades that he learned in the school he was talking about he went to to direct my brother's truth as far as what they wanted it to be.

My brother didn't go to school to show this kind of emotion that he showed on that interview. He didn't go to school for none of that. That came from inside, and yet Weaver Barkman just tried to persuade him every way he can, every tact (sic) he knew how, and yet my brother didn't change his story for the simple reason it wasn't just a story. It was the truth, and it came from here.

Everybody talk about our life as though we are small. Yeah, we had it rough. A lot of other people have it rough, too, and I realize this. They talking about we've been delinquents all our life. They're right, We have. The State has had us all our life. Since so high the State done had us all our life. We've been in one foster home. We've been tooken out to another one. We've been thrown here. We've been thrown there. Some of it -- some of it we did real good in, and yet for some reason we done got pulled out of there, but every place the State has placed us with a solid foundation we maintained. It's always when it's -- when more or less where we don't know how to be directed. We didn't get taught as far as how to guide our life, what's the purpose of life. All we have is dreams all our life. All we had was dreams.

You know, I played a tough guy a lot. I got a big wall right here. I wrote you a letter. It was the hardest thing I ever done because I feel you done read a lot about what everybody else has been writing about me, and now I'm doing the same thing everybody else is doing.

I feel sorry for what happened. I've had three years to go through everything, the sleepless nights I've had, being by myself, being all alone. I know how Miss Lopez feels as far as that day as being the victim. I know how scared she was for her life because I'm here today scared for mine and for my brother. She experienced that one day. I've been experiencing it for three years now wondering what you are going to decide, what kind of public pressure is going to be involved in this. Is it going to be fair or is it going to be like what I've seen already here today? Nobody else is going to decide. All the jury decide as far as the verdict, guilty. I know you the person that's going to decide as far as what everything has been brought up to you, but I do say I wish Michael Alfred would have cross-examined me a little better so he could have got to know Walter LaGrand on that right here and not just what everybody's been telling him and this kind of picture the press done drew of us that is making everybody blind.

Me and my lawyer, Bruce Burke, I ask him one time recently, I say, do you really believe me? I mean as a person, because you're on the other side. You're on the side all these other people are on, and I'm on the different side. I want to ask you do you really believe me. Put down your lawyer -- as being a lawyer. As a person, do you believe me? He gave me his answer. He said yes.

So I'm asking this Court -- I'm asking you and I'm asking everybody in this courtroom today regardless -- I know they ain't making no decision today -- but to set aside their hate and turn around and see what the truth really is. There's doubt in this case. There's plenty of doubt in this case. Sometimes I feel Michael Alfred didn't want to cross-examine me because he didn't want to know me. He didn't want anybody in here today to know me. He asks me about, well, how much a gun cost and all this. Yeah, I know I've done things wrong, and in that bank if we are the vicious killers that we are said to be, nobody talked about how there was no physical -- as far as throwing people around in that bank. There was harsh words said to scare these people and that was it. Nobody got punched in the face. Nothing like this. Yeah, there was a letter opener put on Mr. Hartsock's throat, and it was said, "You don't open the vault, I'm going to kill you." That was said. I said that in front of everybody up here, but that's not what was meant. It was to scare them as far as to open it.

They heard Miss Lopez. She was in a real state of shock. And now I remember what Mr. Barkman did to my brother and I wonder -- I hear Michael Alfred tell me and tell this courtroom how many people talked to Miss Lopez, and, look, these are professional people talking to Miss Lopez, and I wonder has she forgot what the truth was or was the truth misled to help this case and to impose this death penalty on me and my brother today.

I ask you, Your Honor, I ask you that you don't impose the death penalty on me and my brother today, not out of fear of my life only but out of the truth. I don't want anybody to feel sorry for me in here, but I want the people in here to treat me like a human being and not an animal that has four legs. They're worried about me going back out in society, and that's why they feel they need to impose the death penalty, so I don't get back out there or my brother don't get back out there.

I ask you to impose all the time you want that you feel is necessary on this case but spare me and my brother's life. One person already died because of an accident. Two more people don't need to die. We are the victims today. We are. And we are going to be the victims for the rest of our life because we know we have to live through all of this that happened, and I know how Mr. Hartsock's family feels without their father because I ain't had a father. My father left me -- I never seen my father. So I know how their family hurting and feel.

I ask that I'm able to plant a seed, a fresh seed into the ground at the Arizona State Prison where I could start my new life. These whole three years I ain't been doing no time. The whole time I've been up there I ain't been doing no time. The whole time I've been doing is fearing for my life. I really can't -- I couldn't get into anything as far as so many things on my mind.

I thank you for listening to me. I thank for everybody in here to listening to me today. That's all, Your Honor.

THE COURT: Thank you.

Anything further from defense counsel?

MR. GERSON: Nothing further, Your Honor.

MR. BURKE: Nothing further.

THE COURT: Mr. Alfred?

MR. ALFRED: Your Honor, I believe I have said all I have to say on Wednesday and in my memorandum I submitted to the Court.

THE COURT: No legal cause appearing. By reason of the verdicts of the jury, it's the judgment of the Court that each defendant is guilty of murder in the first degree, a Class One felony, in violation of Sections 13-1101 and 13-1105 of the Arizona Revised Statutes;

attempted first-degree murder, a Class Two felony, in violation of Sections 13-1001, 13-1101 and 13-1105, of a dangerous nature; attempted armed robbery, a Class Three felony, in violation of A.R.S. 13-1001, 13-1902 and 13-1904, of a dangerous nature; kidnapping, two counts, both Class Two felonies, in violation of 13-1304, both of a dangerous nature, each committed -- each of the several offenses committed January 7, 1982.

It's the further judgment of the Court that these crimes were repetitive, each defendant having admitted prior dangerous convictions in Case CR-6938 in this court.

The Court has conducted a separate sentencing hearing to determine the existence or nonexistence of the aggravating circumstances included in Section 13-703(F) and the mitigating circumstances in 13-703(G) or otherwise, and the Court has considered also the evidence admitted at trial relating to the circumstances -- these circumstances.

The Court finds beyond a reasonable doubt that both defendants participated in the actual killing of Mr. Hartsock and that both defendants intended to kill him. The Court finds beyond a reasonable doubt the existence of the following aggravating circumstances under A.R.S. 13-703(F). As to Section 13-703(F)(2), the Court finds beyond a reasonable doubt that each defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person, the defendant Walter LaGrand having been convicted of armed robbery and kidnapping, both dangerous, Class Two felonies in Case CR-6938 in the Pima County, Arizona, Superior Court, the conviction being on April 30, 1982, and defendant Karl LaGrand having also been convicted of armed robbery, two counts, kidnapping, three counts, and aggravated assault, one count, all dangerous, in the same case on April 27, 1982.

As to Section 13-703(F)(5), the Court finds beyond a reasonable doubt that both defendants committed the offense in the expectation of the receipt of something of monetary value. I'm utilizing the definition and analysis of this in the case of State vs. Hensley, a recent Arizona Supreme Court case, but my decision would be the same without this factor.

As to 13-703(F)(6), the Court finds beyond a reasonable doubt that both defendants committed the offense in an especially heinous, cruel or depraved manner, stabbing a helpless, defenseless man 26 times, inflicting gratuitous violence on that victim after threatening his life several times while he was a helpless captive and kept uncertain as to his fate.

It's my judgment and finding that the murder was senseless and the manner of causing death was savage.

The Court does not find beyond a reasonable doubt the aggravating circumstances set forth in Subparagraphs 1, 3, 4, 7 or 8 of Section 13-703 of the Arizona Revised Statutes.

As to both defendants, the Court finds none of the mitigating circumstances enumerated in Subparagraphs 1 through 4 of A.R.S. Section 13-703(G). The Court has considered in mitigation as to both defendants their ages. It really isn't much of a factor, I don't think, with regard to the defendant Walter LaGrand. It's more arguably a factor with regard to the defendant Karl LaGrand.

I've also considered in mitigation their unhappy and disruptive childhoods and family lives, lack of a male role-model, their expressed remorse, both here today and in the letters which they have sent me, and I, [redacted]ered the psychological and psychiatric evidence [redacted] their behalf and the other evidence that was presented at the mitigation hearing, both documentary and oral.

As to each defendant, the Court finds that there are no mitigating circumstances sufficient to call for leniency or to outweigh the aggravating factors. Therefore, it is ordered that each defendant be sentenced to death on Count One for the crime of murder in the first degree to be carried out in the manner prescribed by law.

As to Count Two, attempted first-degree murder, it's ordered that each defendant be sentenced to aggravated sentences of 28 years in the custody of the Arizona Department of Corrections.

As to Count Three, attempted armed robbery, it's ordered that each defendant be sentenced to the aggravated sentence of 20 years.

As to each count of kidnapping, it is ordered that each defendant be sentenced to the aggravated sentence of 28 years in the custody of the Arizona Department of Corrections.

As to each defendant, on each of the counts of attempted first-degree murder, attempted armed robbery and kidnapping, the Court finds aggravating circumstances: the infliction or threatened infliction of serious physical injury, the use or threatened use of a dangerous instrument, the presence of an accomplice, that each offense was committed in an especially heinous, cruel or depraved manner -- and I've already set forth my findings on that -- each offense was committed in the expectation of the receipt of something of pecuniary value, further aggravating circumstance is the physical and emotional harm suffered by both of the victims.

As to each defendant, the Court has considered in mitigation the same circumstances considered in connection with the murder sentences, and I make the same findings. I find no mitigating circumstances as to these other offenses sufficient to call for leniency or to outweigh the aggravating circumstances which I've enumerated.

It is further ordered that as to each defendant that the sentences for attempted first-degree murder, attempted armed robbery and kidnapping are to be concurrent with each other but consecutive to the sentence on Count One and to any sentence now being served, whichever may expire the last.

As to each sentence, each defendant is to receive credit for presentence incarceration in this case which has been since January 7, 1982, and I've considered the time of presentence incarceration in determining the sentences I have just imposed.

The statute requires that I set forth the reasons on the record for giving consecutive sentences. Those reasons are the severity of the crimes, the previous felony records, that is of the defendants, the aggravating circumstances for the sentences just imposed -- those are also the reasons -- among the reasons for the consecutive sentences -- and the dangerous threat to the public posed by both defendants.

Further ordered that the defendant be -- defendants be delivered by the Sheriff of Pima County into the custody of the Arizona Department of Corrections for the carrying out of the sentences.

The appeal from the murder convictions and sentences is automatic. It's ordered that notice of appeal to the Arizona Supreme Court be filed.

As to each of the other counts, I want to advise the defendants of certain rights that you have. You have the right to appeal from the judgments and sentences just imposed. If you wish to appeal, you must do so by filing a notice of appeal in writing with the clerk of this court. It must be done within 20 days from today, otherwise you lose your right to appeal.

You have the right to have a lawyer file the appeal for you and handle the appeal for you. You have the right to have a lawyer furnished for you at no expense to yourself if you can't afford one.

You have the right to obtain a copy of the record of this case, and you have the right to obtain the reporter's transcript of the trial in the case and the reporter's transcript of all proceedings in the case for purposes of an appeal, and you have the right to have those furnished for you also at no expense to yourself if you cannot afford them.

Now, do you understand these rights?

MR. WALTER LaGRAND: Yes, Your Honor.

MR. KARL LaGRAND: Yes.

THE COURT: All right. You will be given a notice of appeal rights. You keep that. You sign one copy of it, an extra copy of it, and leave it with the clerk to establish that you were notified of these matters.

Is there anything that has been overlooked? Anything else to take up at this time?

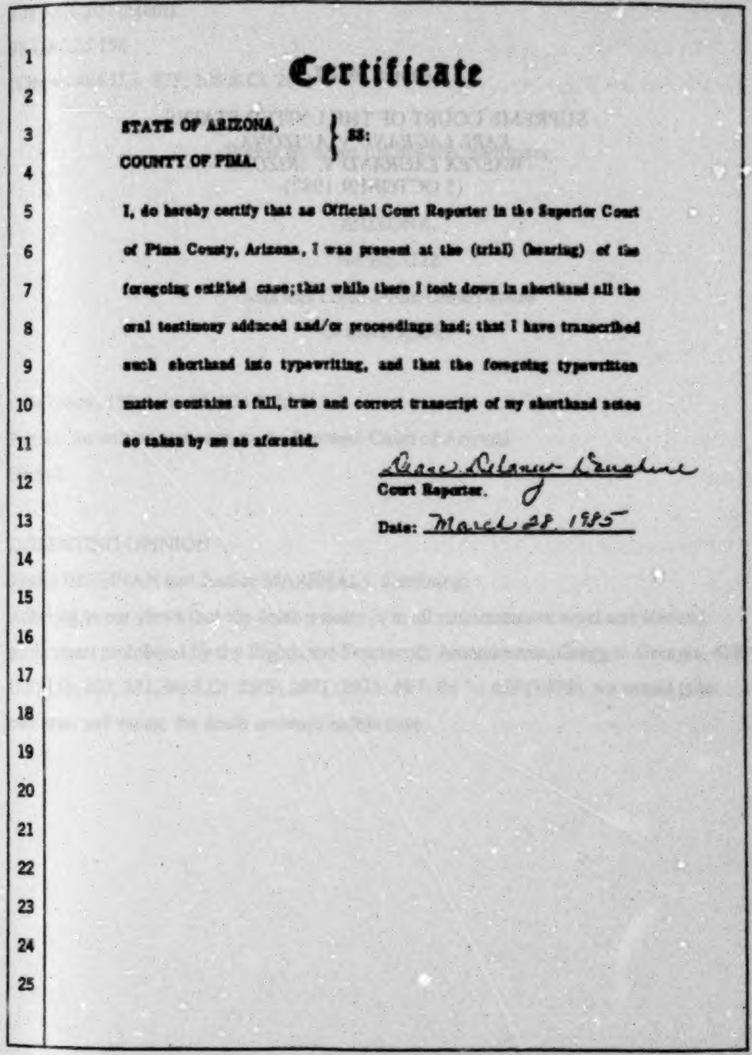
MR. ALFRED: I don't believe so, Your Honor.

MR. BURKE: No, Your Honor.

THE COURT: Mr. Gerson?

MR. GERSON: No, Your Honor.

THE COURT: Very well. The Court stands at recess.



Certificate

STATE OF ARIZONA, } SS:
COUNTY OF PIMA.

I, do hereby certify that as Official Court Reporter in the Superior Court of Pima County, Arizona, I was present at the (trial) (hearing) of the foregoing entitled case; that while there I took down in shorthand all the oral testimony adduced and/or proceedings had; that I have transcribed such shorthand into typewriting, and that the foregoing typewritten matter contains a full, true and correct transcript of my shorthand notes so taken by me as aforesaid.

Grace Delaney-Donahue
Court Reporter.

Date: March 28, 1985

Annex MG 7

SUPREME COURT OF THE UNITED STATES,
KARL LAGRAND V. *ARIZONA*,
WALTER LAGRAND V. *ARIZONA*
(5 OCTOBER 1987)

108 S.Ct. 207 (Mem)
98 L.Ed.2d 158
(Cite as: 484 U.S. 872, 108 S.Ct. 207)

Walter Burnhart LaGRAND, petitioner,
v.
ARIZONA.
No. 86-7112
Supreme Court of the United States
October 5, 1987

Case below, 153 Ariz. 21, 734 P.2d 563.

Petition for writ of certiorari to the Supreme Court of Arizona.

Denied.

DISSENTING OPINION

Justice BRENNAN and Justice MARSHALL dissenting:

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227, 231, 96 S.Ct. 2909, 2971, 2973, 49 L.Ed.2d 859 (1976), we would grant certiorari and vacate the death sentence in this case.

108 S.Ct. 206 (Mem)
98 L.Ed.2d 157
(Cite as: 484 U.S. 872, 108 S.Ct. 206)

Karl Hinze LaGRAND, petitioner,
v.
ARIZONA.
No. 86-7040
Supreme Court of the United States
October 5, 1987

Case below, 152 Ariz. 483, 733 P.2d 1066.

Petition for writ of certiorari to the Supreme Court of Arizona.

Denied.

DISSENTING OPINION

Justice BRENNAN and Justice MARSHALL dissenting:

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, Gregg v. Georgia, 428 U.S. 153, 227, 231, 96 S.Ct. 2909, 2950, 2973, 49 L.Ed.2d 859 (1976), we would grant certiorari and vacate the death sentence in this case.

Annex MG 8

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA,
KARL AND WALTER LAGRAND V. *LEWIS*
(24 JANUARY 1995)

FILED

JAN 2 5 1995

ICT COURT
ARIZONA
DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Karl Hinze LaGrand,
Petitioner,
v.
Samuel Lewis, et al.,
Respondents.

NO. CV 92-026 TUC JMR

ORDER

Walter Burnhard LaGrand,
Petitioner,
v.
Samuel Lewis, et al.,
Respondents.

This is the first in an anticipated series of four orders dealing substantively with petitioners' claims. Subsequent orders will deal with petitioner Karl LaGrand's claim of ineffective assistance of counsel, developed at a hearing held before this Court and supplemented by briefs from the parties; an order reviewing the merits of claims properly preserved for review; and an order dealing with the issue of lethal injection. A schedule for the submission of briefs on the latter issue will be promulgated by minute entry at a later date.

This Court's order of January 12, 1994 ("order") identified certain claims which were precluded from being reviewed on the merits unless petitioners could show cause and prejudice. The petitioners filed separate briefs on this issue, to which respondents answered. The Court will first consider petitioner Walter LaGrand's brief, then petitioner Karl LaGrand's brief, including his supplemental brief on the issue of lethal gas. The Court recognizes the division of labor used by counsel in briefing these issues, and that certain

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Weeks
Amstey
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ICRD
Shattuck
JMR

issues raised in one brief apply equally to both petitioners.

Walter's Brief

1. intoxication instruction

Walter concedes that this issue was not presented in the state courts, but argues that the flexible exhaustion requirement is met nevertheless because Karl raised this issue in his brief. Walter cites no case for the proposition that an issue is preserved for purposes of habeas corpus review in federal court if a co-defendant raised the same issue in state courts. As the Court indicated in its January 12, 1994 order, this contention is not correct. If anything, it serves as an indication of a knowing waiver, as petitioner was aware of the substance of the claim raised in Karl's appeal and knowingly decided not to raise the same issue. He cannot now raise that issue for the first time in federal court without showing cause and prejudice. As petitioner has declined to argue these elements, the Court must conclude that they are not present with respect to this claim. Therefore, review of this claim is barred.

2. vagueness of age criterion in A.R.S. § 13-703(G)(5)

Petitioner cites State v. Carriger, 143 Ariz. 142 (1984) for the proposition that he can return to state court to pursue this admittedly unexhausted claim. Yet a claim can be technically exhausted and procedurally barred because state would not now hear the claims. Coleman v. Thompson, 111 S.Ct. 2546; White v. Lewis, 874 F.2d 599, 601 (9th Cir. 1989). Furthermore, a federal court will not dismiss a claim so that petitioner can return to state court if to do so is nothing more than a "hollow exercise of etiquette." Emmett v. Ricketts, 397 F. Supp. 1025 (N.D. Ga. 1975). Because petitioner's claims are barred from being heard in state court, these claims will not be dismissed.

Rule 32.2(a)(3) bars any claim from being heard via a post-conviction collateral proceeding that could have been raised at trial, on direct appeal, or in a previous collateral proceeding. Petitioners must strictly comply with Rule 32 or be denied relief. State v. Carriger, 143 Ariz. at 146. Failure to comply with Rule 32 procedures will result in a finding that petitioner waived his right to present a Rule 32 petition. Id.

The Ninth Circuit has consistently upheld Arizona's procedural rules of preclusion. In White v. Lewis, the Ninth Circuit upheld the district court's determination that petitioner's claims were exhausted because he had no state remedy currently available at the time of the federal petition. White at 602. Again, in Harmon v. Ryan, 959 F.2d 1457 (9th Cir. 1992), the 9th Circuit held that a petitioner's claims are exhausted, albeit improperly exhausted, where no state remedies are available. In both cases the Ninth Circuit held that the claims were exhausted but procedurally barred, requiring a cause and prejudice scrutiny before the merits of the claims can be heard in federal court.

Yet petitioner claims that he does have a remedy available in state court. He argues that State v. Carriger, supra, announced a rule in which Arizona's rules of preclusion would be waived for capital petitioners. The Court declines to read Carriger so broadly, preferring to follow the Ninth Circuit's en banc interpretation of Carriger in Carriger v. Lewis, 971 F.2d 329 (9th Cir. 1992). There, the court held that although the Arizona Supreme Court reached the merits of certain of Carriger's claims in order to deny them, it also independently denied them on procedural grounds, preventing federal review of those claims in Carriger's habeas petition absent a showing of cause and prejudice. The Arizona Supreme Court obviously could not have independently denied Carriger's claims on procedural grounds if it was waiving Rule 32's requirements. Since petitioner's interpretation of State v. Carriger is flatly inconsistent with the Ninth Circuit's interpretation of that opinion in Carriger v. Lewis, this Court declines to adopt it. Accord, Woratzeck v. Lewis, 863 F. Supp. 1079 (D. Ariz. 1994). Therefore, petitioner's argument that he still has a remedy available to him in state court fails. The Court concludes that this claim is improperly exhausted and procedurally barred so that absent a showing of cause and prejudice this Court may not hear the claim.

Petitioner next argues that this claim does not need to be submitted to cause and prejudice analysis because it was adequately presented to the state courts. The question of whether a claim was adequately presented to the state court is whether the state court was given an opportunity to apply controlling legal principles to the facts bearing upon the constitutional claim. Picard v. Connor, 404 U.S. 270, 277 (1971). This claim contends that A.R.S. § 13-703(G)(5) violates the Due Process Clause of the Fourteenth Amendment because it is vague. This issue was not presented to any state court, yet petitioner contends that the Arizona Supreme Court's search for fundamental error, combined with petitioner's claim before the Supreme Court that mitigating factors present in this case, including petitioner's young age at the time of the crime, were given insufficient weight by the sentencing judge, serve to have given the Arizona Supreme Court an adequate opportunity to rule on this claim. The Court cannot agree with petitioner's argument: contesting the results of a statute as applied is not the same as contesting the constitutionality of the statute. This claim then is unexhausted but procedurally barred, so petitioner must show both cause and prejudice.

As petitioner does not even argue cause or prejudice in his brief, the Court must conclude that these factors are not present here.

3. foreign citizenship

Here petitioner does argue cause and prejudice; the cause alleged is that the government, which had a duty under international treaty of notifying the German consulate of petitioner's arrest, failed to do so.

In order to show cause petitioner must show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule. Murray v. Carrier, 477 U.S. at 488; accord, Coleman v. Thompson, 111 S.Ct. at 2566. Petitioner's allegation of cause misstates the focus on the inquiry here. Even if the state's failure of notifying the German consulate prejudiced him at his sentencing, it certainly does not serve as an excuse for his not having raised this claim previously before the state courts: the state's actions or inactions in no way impeded his ability to raise this claim from being raised previously.

Therefore, as petitioner has failed to demonstrate cause, the Court need not reach the question of possible prejudice to petitioner.

Karl's Brief

1. claims were properly exhausted

Petitioner Karl LaGrand's first argument is to request from this Court a reconsideration of its ruling in the January 12, 1994 order that the rationale of Beam v. Paskett, 3 F.2d 1301 (9th Cir. 1993) does not apply here. In Beam, the Ninth Circuit analyzed Idaho's mandatory review procedures utilized in capital cases and held that in upholding a death sentence, the Idaho Supreme Court must at least implicitly reach the merits of certain statutorily mandated issues. Therefore, for the purpose of federal habeas corpus review, those issues are always exhausted, regardless of whether they are specifically mentioned in the Idaho Supreme Court opinion, or whether they were even briefed before that court.

This Court declined to extend Beam's holding to Arizona's mandatory appeal process for capital cases. The Court noted, as did the Ninth Circuit in Beam itself, that a mandatory appeal, such as Arizona's, is distinct from Idaho's statutorily-mandated review of specific issues, and therefore Beam was distinguishable.

This conclusion is supported by the very issues which petitioner argues are not precluded here because the Arizona Supreme Court supposedly considered them implicitly in its search for fundamental error. These issues include matters which, in order to reach the merits on them, the Arizona Supreme Court would have had to have material not appearing in the record presented to it (e.g., that rights of the petitioner granted him by international treaty were violated). That the Arizona Supreme Court may at times reach the merits of issues not briefed in its review of capital cases for fundamental error in the application of statutorily mandated aggravating and mitigating factors does not waive Picard's rule that a state court be adequately apprised of each constitutional claim and be given an opportunity to apply controlling legal principles to the facts. The Court concludes, therefore, that unless the state courts were given notice of the specifics of each claim, the Arizona Supreme Court's search for error cannot be deemed to have implicitly reached the merits on them.

2. foreign citizenship

Petitioner Karl LaGrand's argument that the state's failure to contact the German consulate upon his arrest serves as cause for his failure to bring this claim before the state courts parallel's Walter's arguments. For the same reasons outlined above in consideration of this issue raised in Walter's brief, this argument is without merit. As petitioner has failed to adequately show cause, the Court need not reach the issue of prejudice.

3. vagueness of age criterion in A.R.S. § 13-703(G)(5)

Petitioner first argues that this issue was presented to the Arizona Supreme Court, thus relieving him of having to show cause and prejudice. The Court rejects this argument for the same reason it rejected it as raised in petitioner Walter LaGrand's brief, above.

Petitioner then alleges that his trial counsel's ineffectiveness constitutes cause for not having raised this issue at trial. As ineffective assistance of counsel can constitute cause, Coleman v. Thompson, 111 S.Ct. 2546, 2566-67, (1991), and the Court has under advisement the issue of petitioner's substantive claim of ineffective assistance of counsel, the Court will reach the issue of prejudice.

To prove prejudice, petitioner "must shoulder the burden of showing, not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." United States v. Frady, 102 S.Ct. 1584, 1596 (1982).

In petitioner's brief, he argues that he was prejudiced by not having the vagueness of the statute challenged because the Arizona Supreme Court and the United States Supreme Court "did not have a chance to examine Arizona's age criterion in the posture in which this case was presented to it." Petitioner does not aver that had either of these courts been presented with this question, they would have decided the issue in favor of petitioner, but merely that they "would have grappled with it." This clearly is not the sort of "actual prejudice" that would meet this prong of the test: it is simply the sort of a mere possibility which the Supreme Court has indicated is insufficient. Id.

4. Arizona's felony murder statute is unconstitutional

This claim was raised at trial, but not on appeal. Again, petitioner is alleging that the cause prong is satisfied by ineffective assistance of counsel, but this time by his appellate counsel. As the Court has not yet ruled on this issue substantively, the Court will again reach the prejudice prong.

This claim alleges that Arizona's felony murder statute, A.R.S. § 13-1105(A)(2), is unconstitutional because it does not allow for a lesser included offense of second degree murder. Petitioner concedes that this issue was decided against him in Schad v. Arizona, 111 S.Ct. 2491 (1991), yet contends that he was prejudiced because had this issue been preserved on appeal, both the Arizona Supreme Court and the U.S. Supreme Court would have been presented with this issue in a far different procedural posture. No indication is given as to what distinguishes this case's procedural posture from that of Schad, or how this could have worked to petitioner's advantage. The Court concludes that this theoretical prejudice is much too ephemeral to meet Frady's test.

4. method of execution: lethal gas

In this Court's order of January 12, 1994, the Court originally ruled, relying on Campbell v. Blodgett, 978 F.2d 1502, 1518 (1992), that this issue was not justiciable because petitioner could avoid this method of execution by the simple expediency of choosing lethal injection instead. Order at 14. Because the en banc panel of the Ninth Circuit overruled this portion of the Campbell opinion in Campbell v. Wood, 18 F.3d 662, 680 (1994), this Court, by order of March 18, 1994, ruled that this claim was justiciable. As petitioner had not raised this claim in state court and was therefore improperly exhausted and procedurally barred, petitioner was given the opportunity to brief the issue of cause and prejudice as it relates to this claim. Petitioner filed a supplemental cause and prejudice brief April 1, 1994.

Petitioner makes several arguments in this brief that the Court will address before reaching the issues of cause and prejudice. He again argues that the Arizona Supreme

Court's search for fundamental error preserves this claim, again citing Beam v. Paskett. For the reasons outlined above, this Court does not consider that the Arizona Supreme Court's search for fairness in the application of the statute implies that it reached the merits of the issue of the constitutionality of that statute.

Petitioner also argues that it would be a "travesty of justice" to allow petitioner to be executed via lethal gas as it is cruel and unusual punishment, apparently arguing that this case meets the "fundamental miscarriage of justice" exception to the cause and prejudice requirement. Coleman v. Thompson, 111 S.Ct. 2546, 2565 (1991). Yet this exception is limited to those situations in which the habeas petitioner "establishes under the probative evidence he has a colorable claim of factual innocence." Sawyer v. Whitley, 112 S.Ct. 2514, 2519 (1992); accord, United States v. Olano, 113 S.Ct. 1770, 1779 (1993) (dicta). In capital habeas cases, the Supreme Court has held that the "'actual innocence' requirement must focus on those elements which render a defendant eligible for the death penalty, and not on additional mitigating evidence which was prevented from being introduced as a result of claimed constitutional error." Sawyer at 2523.

In this brief petitioner does not argue that he is not actually innocent of the death penalty, but that death by a cruel and unusual method would be a travesty of justice. Petitioner does not cite any case which holds that such a possibility meets the fundamental miscarriage of justice exception, and this Court declines to extend this exception into a new arena.

Again petitioner argues that ineffective assistance of trial counsel serves as cause here, and because this issue is under advisement, the Court will go directly to the prejudice prong; however, petitioner completely fails to argue prejudice.

It is just as well that petitioner abandoned any claim of prejudice here, because the Court cannot conceive of any possible prejudice to petitioner. Even assuming that execution by lethal gas is cruel and unusual, which is almost certainly wrong, e.g., Gray v. Lucas, 710 F.2d 1048 (5th Cir. 1983), petitioner can avoid this method of execution by simply refraining from choosing it at least twenty days before the execution date. A.R.S. §

13-7074(B). In such a situation, the method of execution utilized will be lethal injection. Id. Therefore, as a matter of law, petitioner cannot show that he is actually and substantially disadvantaged as a result of not having this claim heard on the merits.

5. presentence report (prior criminal record)

In the January 12, 1994 order, this Court ruled that this claim was improperly exhausted and procedurally barred; however, upon re-examination of the record, it does appear that this claim was presented to the state trial court in both petitioners' Rule 32 pleadings, and the trial court, the last court to substantively rule on this claim, reached the merits. Exhibit G to petitions (minute entries of trial judge denying claim on the merits). The last state court to hear a claim must actually have relied on a procedural bar as an independent basis for denial in order for the claim to be barred on federal habeas review. Harris v. Reed, 109 S.Ct. 1038, 1042 (1989). Therefore, this claim is preserved and the Court will reach the merits on it.

Although respondents have not addressed this issue substantively in his motion for summary judgment, arguing instead that this issue was procedurally barred, the Court nevertheless concludes that due to the insubstantiality of this claim, it is ripe for a ruling on the merits.

Petitioners here claim that the sentencing procedure was constitutionally defective because the sentencing judge had before him a presentence report which discussed petitioners' juvenile records and attached a presentence report from a prior conviction. Petitioners cite Gardner v. Florida, 430 U.S. 349 (1977), for the proposition that reliance on confidential presentence reports by a court violates the Eighth and Fourteenth Amendments. In that case a plurality of the Court held that a sentencing judge's express reliance in part on information contained in a presentence report that was not disclosed to defense counsel violated due process of law. Gardner at 362.

A brief reference to the transcript of the aggravation and mitigation hearing held on December 12, 1984 will serve to enlighten this issue:

> THE COURT: You both received copies of the presentence

report and supporting materials long since, haven't you?
MR. ALFRED [prosecutor]: Yes, Your Honor.
MR. BURKE [petitioner Walter LaGrand's counsel]: Yes, Your Honor.
THE COURT: Mr. Gerson, you did, too, didn't you?
MR. GERSON [petitioner Karl LaGrand's counsel]: Yes.
THE COURT: All right. Of course there are things in there which parallel or duplicate what I've heard at the mitigation-aggravation hearing, and it also--they, I guess I should say, the two presentence reports, also contain things which are not properly considered. I don't think, in determining the sentence as to the murder count, and I won't consider them to that. There are some things in there, though, that I believe I -- let me say it this way. I believe I am required to consider the presentence report and supporting materials in determining the sentences as to the other counts.
Do you agree with that?
MR. ALFRED: Yes.
MR. BURKE: Yes, Your Honor.
MR. GERSON: Yes, Your Honor.

Aggravation-Mitigation Hearing Transcript, p. 108 (emphasis added).

At sentencing, the trial judge made express findings of fact relating to aggravating and mitigating factors without referencing the presentence report. In addition, the Arizona Supreme Court, in two published opinions, State v. LaGrand, 152 Ariz. 483 (1987) (Karl), and State v. LaGrand, 153 Ariz. 21 (1987) (Walter), dealt at length with issues relating to aggravating and mitigating factors and determined that the death sentence was properly applied. The evil that the Gardner plurality sought to rectify was a court relying on undisclosed facts which the defendant had no opportunity to rebut. That is clearly not the situation here. Furthermore, it is uniformly accepted for judges to have juvenile records and presentence reports in front of them for sentencing, and petitioners cite no cases holding this practice to be error. Upon examination of the record, this claim proves to be completely meritless.

Therefore, **IT IS HEREBY ORDERED** that petitioner Karl LaGrand's and petitioner Walter LaGrand's claims relating to the vagueness of the age criterion, foreign citizenship, lethal gas as a method of execution, and the use of the presentence report **ARE DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED that petitioner Walter LaGrand's claim relating to the lack of an intoxication instruction **IS DISMISSED WITH PREJUDICE.**

IT IS FURTHER ORDERED that petitioner Karl LaGrand's claim relating to the unconstitutionality of Arizona' felony murder statute **IS DISMISSED WITH PREJUDICE.**

DATED this 24 day of January, 1995.

John M. Roll

John M. Roll
United States District Judge

Annex MG 9

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA,
KARL AND WALTER LAGRAND V. LEWIS
(16 FEBRUARY 1995).
SOURCE: 883 F.SUPP. 451-469

less likely to have succeeded where the stronger arguments [presented by defendants] did not." (Van Patten Aff., attached expert report at 5.) Plaintiff has not produced a contradictory expert opinion. Plaintiff testified at his deposition that he has no intention of retaining an expert to assist in the presentation of his case. (Randall Dep. at 59.) Therefore, plaintiff fails to controvert defendants' summary judgment motion as to the second element of proof. *See* Fed. R.Civ.P. 56(e); *Anderson*, 477 U.S. at 249, 106 S.Ct. at 2511. Additionally, the Court holds as to the third element of proof that plaintiff fails to produce evidence to create a genuine issue of material fact for trial as to whether, but for defendants' conduct, the state appeal would have turned out differently. Plaintiff himself admitted at his deposition that what the South Dakota Supreme Court might have decided, if faced with different legal issues, would be "pure speculation." (Randall Dep. at 65.) Therefore, defendants are entitled to summary judgment as a matter of law.

The Court determines that defendants are entitled to summary judgment on their counterclaim for legal fees that plaintiff has not paid. Plaintiff admitted at his deposition that defendants performed legal services for him, that defendants are entitled to compensation for their services, and that he has refused to pay the outstanding amount. (Randall Dep. at 132.) Plaintiff has produced absolutely no evidence to create a genuine issue of material fact for trial as to his liability for the payment of attorney's fees to his former counsel. According to defendant Gosch's affidavit, the amount plaintiff owes counterclaimants is $11,079.03; however, defendants have not provided the Court with a current itemized statement showing the balance on plaintiff's account with the firm. Accordingly,

IT IS ORDERED:

(1) that defendants' motion for summary judgment is granted. (Doc. 31.)

(2) that plaintiff's motion for summary judgment is denied. (Doc. 21.)

(3) that defendants are entitled to judgment on their counterclaim for unpaid legal fees of $11,079.03; however, defendants must file with the Court and serve upon plaintiff, no later than Friday, May 12, 1995, a current itemized statement of plaintiff's unpaid attorney's fees and costs, along with authority, if any, for the calculation of interest on the principal balance as well as the calculation and the claimed interest amount. Plaintiff may file and serve any response no later than Friday, May 26, 1995.

(4) that plaintiff's motion for sanctions is denied (Doc. 23), and defendants' request for sanctions is denied. (Doc. 32 at 15.)

(5) that plaintiff's Motion For Procedural Orders Setting a Hearing is denied. (Doc. 22.)

(6) that the Court will enter judgment after the Court determines the amount due to defendants under their counterclaim for attorney's fees and costs.

Karl Hinze LaGRAND, Petitioner,

v.

Samuel LEWIS, et al., Respondents.

Walter Burnhart LaGRAND, Petitioner,

v.

Samuel LEWIS, et al., Respondents.

No. CV 92-026 TUC JMR.

United States District Court,
D. Arizona.

Feb. 16, 1995.

State prisoners who had been convicted of murder and sentenced to death sought habeas corpus. The District Court, Roll, J., held that: (1) counsel was not ineffective, and (2) trial court adequately considered mitigation evidence.

Petitions denied.

1. Criminal Law ⇐641.13(1)

In analyzing claim of ineffective assistance of counsel, court must consider whether counsel's performance was deficient and whether any deficient performance prejudiced defendant.

2. Criminal Law ⇐641.13(2.1)

Counsel was not ineffective for failing to present defense of impulsivity to charge of first-degree murder where state alleged felony murder in addition to premeditation and there was strong evidence of preparation for robbery.

3. Criminal Law ⇐641.13(2.1)

Counsel was not ineffective for failing to present insanity defense where neither of two psychologists suggested that insanity defense was available and where pursuit of insanity defense would have resulted in opening the door to introduction of defendant's juvenile record, in which case jury would have learned of lengthy and violent criminal history.

4. Criminal Law ⇐641.13(6, 7)

After motion to suppress confessions based on *Miranda* violation and voluntariness grounds was granted, counsel was not ineffective for seeking reconsideration of the involuntariness determination, so that confession could be used at mitigation hearing if defendant were convicted and yet could not be used at trial unless defendant testified and where the confession contained some exculpatory material.

5. Criminal Law ⇐641.13(2.1)

Counsel was not ineffective for reserving opening statement until close of government's evidence, even though defendant ultimately presented no evidence and thus lost the opportunity to have an opening statement.

6. Criminal Law ⇐641.13(6)

Counsel's failure to cross-examine most of state's 18 witnesses was not ineffective assistance where counsel for codefendant cross-examined each witness prior to defendant's attorney having the opportunity and where codefendant's attorney did an "excellent job" of cross-examining the witnesses.

7. Criminal Law ⇐641.13(7)

Counsel was not ineffective in presenting evidence of impulsivity at mitigation hearing following defendant's conviction for first-degree murder where counsel introduced reports of psychologists indicating that defendant often acted impulsively and presented defendant's confessions in which there were references to the absence of harming the victims and to a state of panic experienced by the defendant.

8. Criminal Law ⇐641.13(2.1)

Defense counsel's testimony that defendant "deserved better" representation than counsel had given him was not decisive in determining whether counsel's performance was deficient.

9. Jury ⇐108

Right vindicated by *Witherspoon* is the right to be impartially sentenced and the right cannot be infringed, even by improper exclusion of prospective juror, where the jury plays no role in determining sentence.

10. Habeas Corpus ⇐770

Question of jury partiality is a fact question, resolution of which by trial court must be accorded substantial deference on collateral review.

11. Jury ⇐108

Exclusion in capital murder case of juror who stated that she might be influenced in deliberating the verdict by strong opposition to capital punishment was not manifestly erroneous.

12. Criminal Law ⇐126(1)

Relevant question when defendant claims that he was entitled to change of venue because of excessive pretrial publicity is whether the jurors had such fixed opinions that they could not judge the guilt of defendant impartially.

13. Criminal Law ⇐1163(1)

Presumed prejudice standard from denial of change of venue applies where community in which trial was held was saturated with prejudicial and inflammatory pretrial publicity.

14. Criminal Law ⇨1163(2)

Prejudice to defendant would not be presumed from pretrial publicity which consisted of newspaper and television reports related to the crime, the arrest of defendant and his brother, and other controversies involving police response time and procedures for release of suspects prior to trial, where stories ran on the front page for only a few days and then ran only sporadically as new developments occurred, and where stories were factual and not inflammatory, even though newspapers ran versions of transcript of surviving victim's 911 call.

15. Criminal Law ⇨126(1)

Key factor in analysis of whether jurors demonstrated actual partiality or hostility that could not be laid aside is the percentage of prospective jurors who are excused for cause based on preformed opinion of the case, as that can indicate concern over reliability of voir dire responses of remaining potential jurors.

16. Criminal Law ⇨126(1)

Mere fact that jurors had been exposed to pretrial publicity does not raise inference of partiality.

17. Criminal Law ⇨134(4)

In view of the fact that only seven prospective jurors, 15% of the venire panel, were dismissed because of exposure to pretrial publicity, and careful attention given to potential bias by trial court and defense attorneys during voir dire, defendant did not show that he was actually prejudiced by pretrial publicity.

18. Criminal Law ⇨134(4)

No prejudice could be inferred from the fact that four prospective jurors had read recent newspaper article chronicling disagreement between defendant and his trial counsel over quality of representation, where three of the four were dismissed for that reason and the fourth, who also did not serve, stated during voir dire that neither reading the article nor having been exposed to previous publicity predisposed him to either side.

19. Criminal Law ⇨1152(1)

Denial of motion to change counsel will be reversed only upon a showing of abuse of discretion.

20. Criminal Law ⇨641.10(2)

There was no constitutional violation in denial of defendant's motion to change counsel where defendant was receiving minimal acceptable level of effective assistance.

21. Criminal Law ⇨641.13(1)

Sixth Amendment does not guarantee meaningful relationship with one's attorney. U.S.C.A. Const.Amend. 6.

22. Criminal Law ⇨641.3(4)

Motion to change counsel is not a critical stage in the prosecution at which defendant is entitled to counsel. U.S.C.A. Const. Amend. 6.

23. Habeas Corpus ⇨498

In order to be entitled to habeas corpus relief because of denial of instruction relating to intoxication, petitioner must show that lack of the instruction so affected the entire trial that resulting conviction violates due process. U.S.C.A. Const.Amend. 14.

24. Homicide ⇨341

Any error in not instructing jury on intoxication was harmless beyond a reasonable doubt in trial in which defendant was charged with murder on basis of premeditation and felony murder, as defendant could not seriously contend that he was so intoxicated that he was incapable of forming the intent to commit the robbery during which the murder occurred.

25. Criminal Law ⇨774

More than mere evidence of consuming alcohol or smoking marijuana is needed to entitle defendant to instruction on intoxication; evidence allowing for finding of impairment needs to be presented also.

26. Criminal Law ⇨774
Homicide ⇨294.2

Defendant charged with bank robbery and homicide was not entitled to instruction on intoxication based on evidence that he had consumed one beer and that he and his brother had stayed up all night discussing details of planned robbery.

27. Criminal Law ⇐1208.1(5, 6)

Although sentencing court must be allowed to consider any relevant evidence offered by capital defendant in support of sentence other than death, court is not required to find the evidence mitigating or to accord the evidence the weight that the defendant believes is appropriate.

28. Habeas Corpus ⇐503.1

In determining whether state court's application of constitutionally permissible aggravating factor was so erroneous as to raise independent due process or Eighth Amendment violation, standard of review is whether any rational finder of fact could have reached the same conclusion. U.S.C.A. Const. Amends. 8, 14.

29. Homicide ⇐357(9)

Finding that homicide was committed for pecuniary gain, thus allowing imposition of death penalty, was supported by evidence that it occurred during attempted bank robbery.

30. Homicide ⇐358(1)

Even if State Supreme Court did expand definition of pecuniary gain as aggravating factor permitting imposition of death penalty, defendant who was on notice that he risked being sentenced, to death if he committed murder and a rational court found it to have been committed for pecuniary gain received all the notice that he was entitled to. U.S.C.A. Const.Amend. 14.

31. Constitutional Law ⇐266(1)

State rules of evidence can sweep too broadly and exclude in evidence what would otherwise appear trustworthy and thus deprive accused of right of due process. U.S.C.A. Const.Amend. 14.

32. Constitutional Law ⇐266(1)

Criminal Law ⇐528

There was no due process violation in exclusion from defendant's trial of exculpatory confession of codefendant, offered as statement against penal interest, on the basis that it was not sufficiently trustworthy to be admitted as a statement against penal interest. U.S.C.A. Const.Amend. 14; 17A A.R.S. Rules of Evid., Rule 804(b)(3).

33. Homicide ⇐234(2)

Finding that defendant participated in murder was not manifest error, notwithstanding codefendant's confession which indicated that codefendant was solely responsible, in view of testimony of surviving victim of the attack and physical evidence concerning the nature of the killing.

Carla G. Ryan, Tucson, AZ, Lawrence B. Weeks, Berkeley, CA, Bruce A. Burke, Tucson, AZ, for petitioners.

Grant Woods, Atty. Gen., and Diane M. Ramsey, Asst. Atty. Gen., Crim. Appeals Section, Phoenix, AZ, for respondents.

ORDER

ROLL, District Judge.

INTRODUCTION

On February 17, 1984, Petitioners Karl and Walter LaGrand were convicted by a jury of first degree murder and other crimes committed in the course of a failed bank robbery. On December 14, 1984, the trial court sentenced both Petitioners to death. Petitioners seek a writ of habeas corpus from this Court, alleging that certain constitutional errors infected both the guilt and sentencing phases of their state court criminal proceedings. The requested relief is for the verdicts, or, at a minimum, their death sentences, to be set aside. The Court has consolidated both brothers' petitions into this one action.

In this order the Court reaches the merits of Petitioners' claims properly preserved for review, with the exception of the issue of the constitutionality of lethal injection as a method of execution. By separate minute entry a schedule has been promulgated to govern briefing of that issue. Also, by previous order the Court has determined that none of Petitioners' unexhausted or procedurally barred claims can be reviewed on the merits because Petitioners have failed to show cause and prejudice for their actual or constructive procedural defaults. In this order, the Court reaches first the merits of Petitioner Karl LaGrand's claim of ineffective assistance of counsel. In consideration of that claim, the Court has conducted an evidentiary hearing and has received counsel's supplemental briefs. This order then addresses the rest of Petitioner Karl LaGrand's claims before discussing Petitioner Walter LaGrand's claims.

Facts

The Arizona Supreme Court has set forth the facts presented to the jury during the joint trial of Karl LaGrand and his half-brother Walter LaGrand. *State v. LaGrand (Karl)*, 152 Ariz. 483, 733 P.2d 1066 (1987) and *State v. LaGrand (Walter)*, 153 Ariz. 21, 734 P.2d 563 (1987). The Court has also reviewed the trial transcripts as well as Karl LaGrand's taped statements, which were not introduced at trial but were utilized by Karl LaGrand at the sentencing hearing.

Karl and Walter LaGrand decided to rob the Valley National Bank in Marana, Arizona. Karl LaGrand placed a steak knife and electrical tape in a briefcase. He also carried a toy gun. Bandannas were placed in the briefcase so that bank employees could be gagged. Walter LaGrand admitted these matters when he testified at trial. On January 7, 1982, before the bank opened, Karl and Walter LaGrand went to a fast food restaurant located adjacent to the bank. They were in a white vehicle with a brown top. The vehicle was owned by the father of Walter LaGrand's girlfriend.

Shortly thereafter, when 20 year old bank teller Dawn Lopez arrived for work, she observed the white and brown vehicle in the parking lot of the bank. Several minutes later, as she walked past the white and brown vehicle, Walter LaGrand got out of the driver's side and asked her what time the bank opened. When she entered the bank, Walter LaGrand followed. Inside, she saw 63 year old bank manager Ken Hartsock standing by the vault with Karl LaGrand. Karl LaGrand was carrying a briefcase and displayed a gun in Dawn Lopez's presence. The bank manager was unable to open the vault because he had only part of the vault combination. Ms. Lopez heard Walter LaGrand say: "If you can't open it this time, let's just waste them and leave."

Dawn Lopez and Ken Hartsock were moved into the manager's office. When Ms. Lopez told the bank manager that she feared they would be murdered, the manager hugged her and reassured her that the two men would leave after robbing the bank. Ms. Lopez and Mr. Hartsock had their hands bound behind their backs with black electrical tape. Walter LaGrand menaced the manager with a letter opener, holding it to the manager's throat and threatening to kill him.[1]

When bank employee Wilma Rogers arrived for work and observed the unfamiliar vehicle in the parking lot, she placed a phone call to the bank from a nearby store. Karl LaGrand told Ms. Lopez to answer the telephone but warned her that "if you let them know we're in here we're going to shoot you." Ms. Lopez answered the phone and, while Karl LaGrand listened to the conversation, told Ms. Rogers that the manager was not at the bank. Ms. Rogers told Dawn Lopez that Dawn's headlights were on and if Ms. Lopez did not exit the bank and turn them off, Ms. Rogers would contact law enforcement officials.

Dawn Lopez was permitted to leave the bank to turn off her headlights. Before she left the bank building, however, Karl or Walter LaGrand warned her that if she did not return, "we'll just shoot him and leave. We're just going to kill him and leave."[2] She went to her car, turned off the lights, and courageously returned to the bank.

Upon Ms. Lopez's return, her hands were once again taped behind her back. She was placed in a chair facing a corner of the room. The bank manager remained bound and gagged in the same chair he had been in previously. When Ms. Lopez heard sounds of a struggle, she stood up and turned to help the manager. She observed Karl LaGrand holding the manager from behind and Walter LaGrand standing in front of the manager. Walter LaGrand then came toward her and began stabbing her. After she fell to the floor, she could see only feet and Mr. Hartsock lying facedown on the floor. Twice she heard: "Just make sure he is dead."

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[1] In addition to other evidence on this matter, Walter LaGrand testified that he held the letter opener to the bank manager's neck.

[2] Walter LaGrand testified that he warned Ms. Lopez that he would shoot the bank manager if she didn't return.

Walter LaGrand testified that he had been outside when the stabbings occurred and that when he went back into the bank, he told Karl LaGrand to gather up his things and to place them in his briefcase. Karl and Walter LaGrand left the bank.

When emergency personnel arrived at the scene, Ken Hartsock was already dead. He had been stabbed twenty-four times. All of the stab wounds were inflicted to the frontal side of his body and his hands were still bound behind his back by electrical tape. Some wounds were consistent with having been inflicted with a steak knife, though most could have been inflicted by a steak knife or a letter opener. Karl LaGrand's fingerprint was found inside the manager's office. The steak knife brought to the bank by Karl LaGrand was also found in the office. Dawn Lopez survived despite stab wounds to her head, neck and side. She suffered a collapsed lung and was hospitalized three weeks as a result of her injuries.

Walter LaGrand testified that after the failed robbery, he disposed of Karl LaGrand's briefcase in a wash. When it was recovered by the police, it was found to contain Ken Hartsock's letter opener, Dawn Lopez's keys, and Karl LaGrand's jacket.

Because Wilma Rogers had written down the license plate number of the white and brown vehicle, the police soon learned that this vehicle was registered to the father of Walter LaGrand's girlfriend. After Karl and Walter LaGrand returned to the apartment, Walter LaGrand took a nap until he was awakened by the phone ringing. His girlfriend, Karen Libby, left the bedroom to answer it. Walter LaGrand then heard his girlfriend screaming at his brother:

> F___ a__hole, you used my car to rob a bank. You killed a man, and the Feds are over at my dad's house, and they're coming over here.

Shortly thereafter, Karl, Walter, and Walter's girlfriend were arrested in the vehicle after surveillance agents observed them leave the apartment. When the apartment was searched, the police found a steak knife similar to the knife found at the bank.

Following the arrest of Karl and Walter LaGrand, Karl LaGrand confessed.

Procedural Background

Karl and Walter LaGrand were convicted by a jury of first degree murder of Ken Hartsock, attempted murder of Dawn Lopez, attempted armed robbery, and kidnapping of Mr. Hartsock and Ms. Lopez. Both Karl and Walter LaGrand were sentenced to death for the murder of Ken Hartsock.

David Gerson was Karl LaGrand's lawyer at trial and through sentencing. Bruce Burke has been Walter LaGrand's attorney since prior to trial.[3]

Karl and Walter LaGrand separately appealed their convictions to the Arizona Supreme Court. The convictions and death sentences were affirmed. *State v. LaGrand (Karl)*, 152 Ariz. 483, 733 P.2d 1066 (1987) and *State v. LaGrand (Walter)*, 153 Ariz. 21, 734 P.2d 563 (1987). Karl and Walter LaGrand thereafter filed petitions for writ of certiorari, which were denied by the United States Supreme Court. In 1989, the Pima County Superior Court denied post-conviction relief. In 1990, the Arizona Supreme Court denied review. On June 28, 1991, the U.S. Supreme Court denied certiorari of post-conviction relief claims. In March of 1993, Petitioners' memoranda in support of their applications for habeas corpus relief were filed in U.S. District Court.

Although Petitioners Karl and Walter LaGrand filed separate petitions for writ of habeas corpus, due to some similar claims arising from their joint trial, the petitions were consolidated into this single action.

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[3] Walter LaGrand entered a waiver of any potential claims of ineffective assistance of counsel and Mr. Burke indicated to the Court that he believes no such grounds existed.

KARL LAGRAND'S PETITION

Ineffective assistance of counsel

Petitioner Karl LaGrand, in his habeas corpus petition, presents a claim of ineffective assistance of counsel. He alleges that his attorneys rendered ineffective assistance of counsel prior to trial, at trial, during the mitigation hearing, in other post-trial proceedings, and on appeal.

An evidentiary hearing was conducted in connection with Petitioner's claim of ineffective assistance of counsel. Attorneys representing Walter LaGrand as well as previous attorneys for Petitioner testified on behalf of Petitioner. The Court has reviewed pertinent transcripts of proceedings and Petitioner's confessions offered at his mitigation hearing. Counsel have also submitted supplemental written arguments and Petitioner has submitted a proffer consisting of affidavits of attorney Robert J. Hirsh and others and documents Mr. Hirsh relies upon in formulating his opinions.

Discussion

[1] The procedure to be used in analyzing a claim of ineffective assistance of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The court must conduct a two prong analysis: (1) was counsel's performance deficient, and (2) did any deficient performance prejudice the defendant. *Strickland*, 466 U.S. at 686, 104 S.Ct. at 2064.

In analyzing a claim of ineffective assistance of counsel, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.*, 466 U.S. at 689, 104 S.Ct. at 2065. "[E]very effort [must] be made to eliminate the distorting effects of hindsight.... [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...." *Id.*

Preliminarily, the evidentiary hearing concerning Petitioner's claim of ineffective assistance of counsel was limited to the first prong of *Strickland*, that is, whether counsel's performance was deficient. In order to establish deficient performance, Petitioner was required to demonstrate "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 686, 104 S.Ct. at 2064.

1. POSSIBLE DEFENSES

A. Impulsivity

Karl LaGrand argues that the lawyer who represented him at trial and at sentencing, David Gerson, failed to introduce evidence of impulsivity.

[2] Petitioner contends that a defense of impulsivity should have been used by defense counsel to reduce the seriousness of the first degree murder charge. The state, however, alleged that Petitioner had committed first degree murder in two ways: under a theory of felony murder and by virtue of premeditation. When the jury found Petitioner and Walter LaGrand guilty of first degree murder, it did not indicate whether their verdicts were based upon premeditation, felony murder, or both theories. Impulsivity evidence would have been irrelevant to the felony murder allegation, unless Petitioner was so impulsive as to be unable to form the intent to rob. Such a claim was untenable in light of evidence of preparation for the robbery.

Petitioner points to *State v. Christensen*, 129 Ariz. 32, 628 P.2d 580 (1981), as authority for the proposition that evidence of impulsivity can be introduced at trial in order to reduce first degree murder to second degree murder. In *Christensen*, however, the defendant was charged with having committed the premeditated murder of his wife. There, no evidence supported a claim of felony murder. Christensen was not otherwise engaged in the commission of a felony when the alleged murder occurred. He was guilty of first degree murder, if at all, because he had premeditated her murder. Here, unlike in *Christensen*, stronger evidence of impulsivity would not have provided Petitioner with an effective defense to first degree murder because it would not have negated any element of felony murder.

Furthermore, in *Strickland* the Supreme Court stated: "[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." 466 U.S. at 691, 104 S.Ct. at 2066. Prior to Ken Hartsock being stabbed, Walter LaGrand had stated that he was going to kill the bank manager if the bank manager was lying about being unable to open the vault. Before Dawn Lopez was permitted to leave the bank to turn off her headlights, she was told that if she did not return, Ken Hartsock would be killed. The bank manager was stabbed twenty-four times and Dawn Lopez was stabbed at least seven times. After Ken Hartsock was repeatedly stabbed, either Petitioner or Walter LaGrand was overheard to say: "Just make sure he's dead." Ms. Lopez testified that she heard both Petitioner and Walter LaGrand make such a statement. This evidence belies a claim of impulsivity.

In any event, to say that Petitioner's lawyer ignored evidence of impulsivity is factually incorrect. Walter LaGrand testified at trial that after the two left the bank, Petitioner stated that he had panicked: "[Petitioner] tells me how he panicked, how the man got up and tried to kick him and kicked him when he went over to sit the lady down." Walter LaGrand testified that Petitioner was "breathing real heavily, his nose bleeds. He's still in shock."

During summation, Petitioner's counsel argued that after Ken Hartsock kicked Petitioner, "a violent, unfortunate reaction struck out. He did not intend to hurt anybody."

The claim that Petitioner's lawyer was unaware of the *Christensen* decision is conclusively disproved by the state's tender of *State v. Ramos*, 133 Ariz. 12, 648 P.2d 127 (App.1981), *vacated*, 133 Ariz. 4, 648 P.2d 119 (1982). Ramos was represented by Gerson on appeal and *Christensen* was discussed in these appellate decisions.

Petitioner's counsel's failure to further pursue an impulsivity defense did not constitute deficient performance.

B. *Insanity*

[3] Petitioner suggests that his counsel rendered ineffective assistance because counsel failed to present an insanity defense. Neither the report of psychologist Dr. Lewis Hertz or psychiatrist Dr. Edward Meshorer suggests that an insanity defense was available to the defendant. Dr. Hertz's report, which was prepared prior to trial, contained the following statement: "Karl stated that he knew right from wrong...." While Dr. Meshorer's report does not address the *M'Naughten* Test for insanity, it gives no hint of an insanity defense having been a viable option for Petitioner. The Arizona Supreme Court pointed out that "no evidence of *M'Naughten* insanity existed." *LaGrand (Karl)*, 152 Ariz. at 485, 733 P.2d at 1068.

In rejecting this claim as a basis for a finding of ineffective assistance of counsel, the Arizona Supreme Court stated that "not pursuing an insanity defense precluded opening Karl's juvenile record to inspection and exposing ... his past to scrutiny." *Id.* Arizona permits such evidence in order to shed light on the entire life of someone claiming insanity. *Id.* This includes evidence of juvenile violations. *State v. Rodriguez*, 126 Ariz. 28, 31, 612 P.2d 484, 487 (1980).

Had Petitioner's counsel opened the door to Petitioner's past, the jury would have learned of a lengthy and violent criminal history. Petitioner's presentence reports indicate that less than three months before the events of this case occurred, on two separate occasions the defendant committed armed robberies and kidnappings at Tucson grocery stores, and had prepared to commit another armed robbery at a third grocery store. When the murder of Ken Hartsock occurred, he had been released on bail while awaiting trial for armed robbery and kidnapping.

As a juvenile, Petitioner was adjudicated delinquent for multiple burglaries, armed robbery and kidnapping.

In the absence of any evidence in support of an insanity defense and in light of the extremely damaging evidence which would have been admissible under Arizona law had such a defense been presented, failure to pursue an insanity defense did not constitute deficient performance.[4]

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[4] Karl LaGrand now suggests that his attempt to assume full responsibility for the murder is

2. SUPPRESSION OF CONFESSION

[4] Petitioner points to the fact that his lawyer initially sought suppression of his confessions based upon violation of *Miranda* as well as on voluntariness grounds. After Karl LaGrand's previous attorney obtained suppression of Petitioner's confessions, Petitioner's counsel reconsidered the wisdom of having obtained an adjudication of involuntariness. Because an involuntary confession is inadmissible for any purpose, *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), a determination of involuntariness would have precluded Petitioner from using the statement in any context, including sentencing proceedings should conviction occur, because of the untrustworthiness of the confession. The Arizona Supreme Court discussed the circumstances surrounding this change in strategy in *State v. LaGrand (Walter)*, 153 Ariz. at 25–26, 734 P.2d at 568.

Petitioner's confessions, while evidencing impulsivity, also contained highly incriminating statements tending to place the entire blame for Ken Hartsock's death on Petitioner. *LaGrand (Walter)*, *Id.*

In the taped confession made on the evening of January 7, 1982, at an office of Arizona Department of Public Safety, Petitioner told a detective that he had conducted surveillance on the bank two days before the attempted robbery, used a police scanner during the robbery, bought a toy gun the day before the robbery to use during the robbery, and picked that bank because it was "away from town" and near the freeway.

In a second taped statement made after midnight on January 8, 1982, Petitioner told the detective that he used a letter opener to stab both victims, threw the toy gun and letter opener away, had been responsible for taping the manager's hands behind his back, and knew his actions were wrong.

Petitioner's counsel's decision to seek retraction of the trial judge's ruling to the extent that the court had ruled that his confessions were involuntary enabled Petitioner to exclude the confessions at trial unless Petitioner testified and yet allowed the confessions to be used at the mitigation hearing. *LaGrand (Walter)*, 153 Ariz. at 26, 734 P.2d at 568. In fact, at the mitigation hearing Petitioner's attorney played recordings of Petitioner's confessions. This strategy enabled Petitioner to exclude the confessions when they would have been most damaging, *i.e.*, at trial, yet utilize them in connection with sentencing.

This does not indicate deficient performance.

3. TRIAL ISSUES

Petitioner argues that his attorney rendered ineffective assistance of counsel because he did not make an opening statement, examined only two of eighteen witnesses called by the state, and, just before closing argument, mentioned to Walter LaGrand's attorney that an argument concerning reasonable doubt used in a trial in another state might be utilized by Petitioner's counsel.

A. Failure to give an opening statement

[5] Petitioner asserts that his counsel waived opening statement. The record reflects that after co-counsel delivered his opening statement, Mr. Gerson *reserved* opening statement. This means that he chose to wait until hearing all of the government's evidence before making an opening statement. This procedure is expressly provided for under the Arizona Rules of Criminal Procedure. Ariz.R.Crim.P. 19.1(a)(3). Because Petitioner ultimately presented no evidence, the opportunity to give an opening statement later was lost. This does not constitute deficient performance.

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symptomatic of insanity. The physical evidence, including the absence of stab wounds to the back of the victim, strongly suggests that two people collaborated in the assault on Mr. Hartsock, with one person holding him from behind and the other stabbing him from the front. This coincides with the eyewitness account of the murder.

In light of the overwhelming nature of the evidence against both Karl and Walter LaGrand, a far more plausible explanation of Petitioner's attempt to assume full responsibility is that Petitioner thought he might thereby at least exculpate his brother.

As with a substantial portion of Petitioner's counsel's testimony at the evidentiary hearing on ineffective assistance of counsel, Mr. Gerson stated that he could not recall why he had waived opening statement.

B. *Failure to examine the bulk of State's witnesses*

Petitioner's counsel cross-examined only two of the state's eighteen witnesses. One of these witnesses, however, was Dawn Lopez, the only eyewitness to the slaying of Ken Hartsock and the attempted murder of Ms. Lopez.

[6] In concluding that Gerson's conduct did not constitute ineffective assistance, the Arizona Supreme Court pointed out that Bruce Burke, Walter LaGrand's attorney, "did an excellent job of cross-examining" the state's witnesses. *LaGrand (Karl)*, 152 Ariz. at 486, 733 P.2d at 1069. At the evidentiary hearing, counsel for the state pointed out that the order of examination of witnesses resulted in Mr. Burke cross-examining each witness prior to Mr. Gerson having that opportunity. Accordingly, it would have been inappropriate for Petitioner's counsel to repeat the same matters on cross-examination that were asked by co-counsel. *See, e.g., Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir.1992) (trial court has discretion to limit redundant cross-examination). Under these circumstances, counsel's performance was not deficient.

Evidence was presented at the hearing that Petitioner's counsel was provided the various reports and statements of witnesses, as well as transcripts of interviews of the various witnesses conducted by co-counsel. These items were reviewed by Petitioner's counsel.

The Arizona Supreme Court concluded that while Gerson "kept an exceedingly low profile, we cannot say that his performance was so deficient as to compromise the adversarial nature of the trial." *LaGrand (Karl)*, 152 Ariz. at 496, 733 P.2d at 1069. As the Arizona Supreme Court pointed out and as nearly every witness at the evidentiary hearing agreed, the evidence against Petitioner was quite substantial. Evidence of impulsivity was presented to the jury by Petitioner through the cross-examination of Dawn Lopez and during closing argument. At trial, the strategies of respective defense counsel were not nearly as antagonistic as is now suggested. Evidence against both Karl and Walter LaGrand overlapped. Questions asked by co-counsel, who went first, oftentimes inured to the benefit of Petitioner. For example, Walter LaGrand's attorney extensively cross-examined Dawn Lopez regarding prior inconsistent statements indicative of uncertainty as to some details. Walter LaGrand's expert regarding flaws associated with eyewitness testimony benefitted Petitioner as well as Walter LaGrand. Counsel's performance was not deficient.

4. MITIGATION HEARING

[7] Petitioner also alleges that his counsel rendered ineffective assistance at the mitigation hearing.

Petitioner was convicted of first degree murder of Ken Hartsock. The state possessed substantial evidence that Mr. Hartsock was murdered during an attempted robbery and his murder was premeditated.

The evidence against Petitioner was vast and compelling. Counsel attempted to convince the judge that Mr. Hartsock's twenty-four stab wounds were inflicted as a result of impulsivity. Petitioner's counsel presented testimony from Dr. Edward Meshorer, a psychiatrist with extensive forensic experience. Counsel's evidence included the reports of Dr. Meshorer and Dr. Lewis Hertz. Dr. Hertz is a clinical psychologist. These reports addressed the effect of stress on Petitioner and the absence of premeditation. Dr. Hertz's report stated in part: "When frustrated, he suddenly becomes belligerent, irritable, and demanding. Stress may be conducive to increased impulsivity and to transitory disruptions." Dr. Meshorer's report quoted Petitioner regarding the attempted robbery: "I never expected to get into the trouble that I got in to. I figured that it was going to be an easy job, that nobody would get hurt. I didn't wish to hurt nobody nor nothing. I just lost control." Dr. Meshorer also stated in his report:

> He claims that the murder was not premeditated. He just happened to pick up a letter opener which was handy that was on the manager's desk. Unlike many letter openers, this one was fairly sharp at the end.
>
> ....
>
> It is fairly obvious that Karl had no intention of killing the bank manager.... Furthermore, evidence of lack of premeditation was presented at the mitigation hearing through the testimony of Dr. Meshorer. Counsel also played Petitioner's confessions for the court. Throughout the two confessions made by Petitioner, there are references to the absence of any intention of harming the victims and to a state of panic experienced by Petitioner.

Counsel did not perform deficiently in presenting evidence of impulsivity in this fashion.

At the mitigation hearing, co-defendant Walter LaGrand called two witnesses: Dr. David Gurland, a Tucson psychiatrist, and Pat LaGrand, the half-sister of Petitioner and Walter LaGrand. The testimony of Petitioner's sister also offered insight into the family life of Petitioner. During the sister's testimony, questions asked by the co-defendant's attorney frequently encompassed both the co-defendant and Petitioner.

Without reviewing the previously discussed evidence, the evidence against Petitioner was overwhelming. Eyewitness testimony, co-defendant testimony, physical evidence, and other damning matters left no doubt that Petitioner participated in a vicious assault upon an incapacitated bank manager and upon a 20 year old female teller during a bank robbery gone awry.

Petitioner presented nothing more than bare allegations regarding additional deficiencies in post-trial proceedings.

Petitioner's counsel's conduct did not constitute deficient performance.

[8] Attorney David Gerson testified that Petitioner "deserved better" representation than Gerson gave him. Self-condemnation by former counsel in this context is not decisive. *Atkins v. Singletary*, 965 F.2d 952, 959–60 (11th Cir.1992); *Harris v. Dugger*, 874 F.2d 756, 761 n. 4 (11th Cir.1989), *cert. denied*, 493 U.S. 1011, 110 S.Ct. 573, 107 L.Ed.2d 568 (1989); *Middleton v. Evatt*, 855 F.Supp. 837, 841 n. 4 (D.S.C.1994).

5. ON APPEAL

Although Petitioner suggests the representation by counsel on appeal was ineffective, nothing but bare allegations have been advanced in this regard.

Remaining Claims

The Court next examines Petitioner Karl LaGrand's remaining claims properly preserved for review before turning to claims raised in Petitioner Walter LaGrand's petition.

Excusing a juror who disfavored capital punishment

Petitioner next argues that the trial court committed constitutional error when it dismissed for cause a prospective juror who stated she might be influenced, in deliberating on the verdict, by her strong opposition to capital punishment. Petitioner contends that this prospective juror was not excludable under *Lockhart v. McCree*, 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986), because she did not explicitly state that her philosophical views would either prevent or substantially impair her performance as a juror. Upon direct review, the Arizona Supreme Court noted the ambiguous and somewhat contradictory responses of this prospective juror during *voir dire*, and upheld the trial court's finding of excludability. The Court used a deferential ("fairly supported by the record") standard of review, citing *Wainwright v. Witt*, 469 U.S. 412, 433–34, 105 S.Ct. 844, 857, 83 L.Ed.2d 841 (1985), as support for this standard.

[9] The Court must deny Petitioner relief on this claim for two reasons. First, the right vindicated by the progeny of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) and *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), cited by Petitioner, is the right to be impartially sentenced. As a jury plays no role in Arizona in determining the sentence, this right cannot be infringed even were a

prospective juror to be improperly excluded. *Evans v. Lewis*, 855 F.2d 631 (9th Cir.1988). Petitioner tries to distinguish this case from *Evans* by claiming, without citing any authority, that the right at stake here is not his right to be impartially sentenced, but rather his "right to have confidence in the fairness of the criminal judicial system which tries him for a capital offense." The Court concludes that this case is not distinguishable from *Evans* and that its holding controls.

[10, 11] Second, even if *Evans* did not control, the question of juror partiality is a fact question, resolutions of which made by the trial court must be accorded substantial deference on collateral review. *Harris v. Pulley*, 885 F.2d 1354, 1360 (9th Cir.1988). Like the Arizona Supreme Court, this Court concludes that it must apply *Wainwright's* "fairly supported by the record" standard. Under this standard, the trial court's exclusion of this prospective juror is not manifestly erroneous. Therefore, Petitioner has not demonstrated constitutional error here.

Denial of motion for a change of venue based upon pretrial publicity

[12] Petitioner argues that the trial court committed constitutional error when his motion for a change of venue based on extensive pretrial publicity was denied. The relevant question before the Court is whether the jurors at Petitioner's trial had such fixed opinions that they could not judge impartially the guilt of the defendant. *Patton v. Yount*, 467 U.S. 1025, 1035, 104 S.Ct. 2885, 2891, 81 L.Ed 2d 847 (1984). This is a factual inquiry, and the findings of historical fact made by the trial court are to be treated as presumptively correct on collateral review. 28 U.S.C. § 2254(d); *Patton, supra; Greenawalt v. Ricketts*, 943 F.2d 1020, 1029 (9th Cir.1991). Petitioner's counsel argued this issue to the trial judge, who was in a far better position to determine the biases and prejudices of the prospective jurors. The trial court denied Petitioner's motion for a change of venue based on pretrial publicity after a full and fair hearing. Transcript of February 3, 1984 at 700. This Court, after independently reviewing the record, *Harris*, 885 F.2d at 1360, will overturn that decision only upon a showing of manifest error. *Patton*, 467 U.S. at 1032, 104 S.Ct. at 2889.

[13] Petitioner argues that the facts of this case meet both the presumed prejudice and actual prejudice standards, either of which will require this Court to set aside the verdict. The presumed prejudice standard applies where the community in which the trial was held was saturated with prejudicial and inflammatory pretrial publicity. *Rideau v. Louisiana*, 373 U.S. 723, 726–27, 83 S.Ct. 1417, 1419, 10 L.Ed.2d 663 (1963). The presumed prejudice principle is rarely applied and is reserved for extreme situations. *Harris*, 885 F.2d at 1361 (citations omitted).

[14] In *Rideau*, a local TV station broadcast the accused's videotaped confession three times in a parish of only 150,000 people. Three jurors actually saw the confession. The facts here do not approach those of *Rideau*. The Court has examined Petitioner's exhibits D and E, consisting of newspaper and television reports related to the crime, his and his brother's arrests, and other controversies involving police response time and procedures for releasing suspects prior to trial. The exhibits show that the crimes did arouse interest in the Tucson area, as the two local newspapers ran front-page stories on the crimes in the days immediately following, including reporting on the arrests. However, the stories quickly dropped to the lower portion of the front page, then to the inside pages, and after a few weeks, the stories ran only sporadically as new developments occurred, such as Petitioners' trials and sentencings on unrelated armed robbery and kidnapping charges. These stories were factual in nature and not inflammatory. Although both local newspapers ran either unedited, or in the case of *The Citizen*, slightly edited, versions of the transcript of the surviving victim's 911 call (*The Arizona Daily Star*, Jan. 21, 1982 at A6 and *The Tucson Citizen*, January 21, 1982 at 5A), the sympathy that might have been aroused does not approach the intensity or degree of saturation which the Supreme Court held to require a change of venue in *Rideau*.

Very soon after their arrest, the news stories changed their focus from Petitioners and the crime itself, to controversies relating to the response time of the Marana Town Marshall and the circumstances surrounding Walter LaGrand's release from jail less than twenty-four hours before these crimes occurred. Editorials called for a calm and measured response. The effect of the printed media coverage submitted on this issue was not to inflame the passions of the community against Petitioners, but rather its purpose obviously was to inform the public of the performance of local governmental bodies. Furthermore, Petitioners were tried two years after the vast majority of those stories had run. The passage of time is an important factor in assessing community reaction. *Patton*, 467 U.S. at 1034 [illegible] at 2890. Under these facts prejudice will not be presumed.

[15–17] Nor can Petitioner establish actual prejudice. The relevant question under this standard is whether the jurors demonstrated actual partiality or hostility that could not be laid aside. *Harris*, 885 F.2d at 1355 (citations omitted). A key factor in this analysis is the percentage of prospective jurors who were excused for cause based on a preformed opinion of the case, as this can indicate concern over the reliability of *voir dire* responses of the remaining potential jurors. *Id.* However, merely having been exposed to pretrial publicity does not raise an inference of partiality. *Id.* Here, Petitioner claims that because 14 of the potential jurors called were excused for having a preformed opinion of the guilt of Petitioner and Walter LaGrand or for exposure to pretrial publicity, an inference of juror partiality must be made. This is incorrect. First, as indicated above, mere exposure to publicity is not the relevant question; rather, this factor focuses on the number of potential jurors who admit to a preformed disposition to convict based on the publicity. After independently reviewing the record, the Court finds that only seven prospective jurors were dismissed for this reason. This constitutes a lower percentage (15 percent) than was found acceptable in *Harris, supra*, (18 percent) or in *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975) (26 percent). Second, it is apparent from the record that careful attention was given to potential juror bias by both the trial court and defense attorneys during *voir dire*. The court allowed for extensive individual *voir dire* and dismissed a number of jurors, not based on preformed opinion, but simply based on knowing "a little too much" about the case. The Court will not draw an inference of juror partiality, as Petitioner suggests, from the precautions taken by the trial court.

[18] Petitioner also argues that actual prejudice is shown because four prospective jurors had read a recent newspaper article chronicling the disagreement between Petitioner and his trial counsel over the quality of his representation. No possible prejudice can be inferred from this fact because three of the four were dismissed for this reason, and the other one, who did not serve on the jury, stated under oath during *voir dire* that neither reading that article nor having been exposed to previous publicity predisposed him to either side. The trial court's finding that this juror was not biased is a fact question that this Court cannot overturn absent a showing of manifest error. Petitioner has failed to do this. Based on the facts presented, Petitioner has failed to carry his burden of demonstrating actual juror bias.

Denial of motion for new counsel

[19] In this claim, Petitioner argues that the trial court committed error when it denied his motion to change counsel before trial. The denial of a motion to change counsel will only be reversed upon a showing of abuse of discretion. *United States v. Machor*, 879 F.2d 945 (1st Cir.1989).

[20, 21] The trial court heard argument on this motion the day before trial, and questioned Petitioner at length as to why he wanted to change counsel. Petitioner based his motion on his evaluation of his counsel's performance to date. The trial court at the time of the hearing, the Arizona Supreme Court on direct review, and this Court have all concluded that Petitioner did receive or was receiving at least the minimally acceptable level of effective assistance of counsel.

Petitioner also complained that his counsel was not visiting him enough. The Sixth Amendment does not guarantee a meaningful relationship with one's attorney. *Morris v. Slappy*, 461 U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). There was no constitutional violation here.

[22] Petitioner also argues that this Court should extend the holding of *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), that an accused has a right to counsel at each critical stage of prosecution, to the situation here. He argues that he was effectively unrepresented at the hearing on his motion for a change of counsel because his interests conflicted with those of his attorney at this hearing. Even if Petitioner's interests so diverged from his attorney's that it would be correct to conclude that he was constructively unrepresented, this Court declines Petitioner's invitation that it define a hearing on a motion to change counsel as a critical stage in prosecution. Such a ruling would effectively create a new right under the Sixth Amendment to the appointment of a second counsel at such hearings. The facts here do not warrant such a novel extension of the law interpreting the Sixth Amendment.

Denial of requested intoxication instruction

[23, 24] In this claim, Petitioner argues that the trial court committed constitutional error when it denied Petitioner's requested jury instruction relating to intoxication. He argues that the evidence in the record could have allowed a reasonable jury, properly instructed, to find that his state of intoxication at the time of the crimes prevented him from forming the necessary culpable mental state. At this stage, Petitioner bears a heavy burden in attacking the propriety of jury instructions. *Henderson v. Kibbe*, 431 U.S. 145, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977). Petitioner must show that the lack of such an instruction so infected the entire trial that the resulting conviction violates due process. *Id.* at 154, 97 S.Ct. at 1737. This is an especially high burden in this case, because the jury could have returned its verdict of first degree murder based on a theory of felony murder. Felony murder uses as its requisite mental state the defendant's intent to commit the underlying felony. Petitioner cannot seriously contend that he was so intoxicated he was incapable of forming the intent to rob the bank. As the jury also convicted Petitioner of the underlying felony, all the elements of felony murder were established beyond a reasonable doubt. Also, the trial judge, well aware of the law that this instruction would have imparted to the jury, found beyond a reasonable doubt that the murder was premeditated. Under these circumstances, even if the trial court erred in not instructing the jury on this theory, it was harmless error beyond a reasonable doubt.

[25, 26] In any event, a review of the trial record establishes that there was insufficient evidence to support such an instruction. More than mere evidence of consuming alcohol and smoking marijuana is needed. Evidence allowing for a finding of impairment needs to be present. *State v. Cruz-Mata*, 138 Ariz. 370, 374, 674 P.2d 1368, 1372 (1983). Walter LaGrand's uncontradicted testimony was that after partying the evening before, he and Karl LaGrand stayed up all night discussing the details of the planned robbery. Petitioner drove to Marana because Walter LaGrand did not know the location of the bank. Nothing in Walter LaGrand's or Dawn Lopez's testimony of the events that morning supports a finding of impairment. In Petitioner's taped confession of January 7, 1992, at 10:20 p.m., Petitioner told the detective that before going to the bank he had consumed one beer, no other intoxicants, and no drugs. Karen Libby did testify that she saw the brothers upon their return to the apartment after the murder and that they looked "different." In answer to a direct question as to whether she thought they were intoxicated, she said "I don't know." Something more than this is necessary to support the requested instruction. Therefore, the trial court did not err.

Age as a mitigating factor

[27] In this claim, Petitioner argues that the sentencing judge committed constitutional error by not according greater weight to the fact that Petitioner was 19 years old at

the time of the offense. The United States Supreme Court requires that the sentencing court must be allowed to consider any relevant evidence offered by a capital defendant in support of a sentence other than death. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Woratzeck v. Lewis*, 863 F.Supp. 1079 (D.Ariz.1994). The court, however, is not required to find the evidence mitigating, or to accord the evidence the weight a defendant believes is appropriate. *Eddings*, 455 U.S. at 113–114, 102 S.Ct. at 876–77. The record reflects that the trial court and Arizona Supreme Court found this to be a mitigating factor, but not of sufficient weight to merit a more lenient sentence. *LaGrand (Walter)*, 153 Ariz. at 37, 734 P.2d at 573. As both the trial court and the Arizona Supreme Court considered this factor, there is no constitutional violation.

Abused childhood as mitigating factor

Petitioner claims that the sentencing court failed to consider sufficiently Petitioner's childhood as a mitigating factor. For the same reason explained above in the discussions concerning Petitioner's claims relating to other mitigating evidence, the Supreme Court does not require that a court give mitigating evidence any particular weight, only that it be considered. This factor was considered, and so there is no constitutional violation.

Cruel, heinous or depraved aggravating factor

In this claim, Petitioner contends that the sentencing court committed constitutional error when it found that the aggravating factor of cruel, heinous or depraved from A.R.S. § 13–703(F)(6) applied to this crime. Petitioner is not contending that the statute as interpreted by the narrowing case law is unconstitutional, because the Supreme Court has already decided it is. *Walton v. Arizona*, 497 U.S. 639, 654, 110 S.Ct. 3047, 3057–58, 111 L.Ed.2d 511 (1990). Rather, Petitioner argues that the facts here do not support such a finding. This Court is mindful that findings of fact relating to aggravating factors will not be disturbed on collateral review absent a showing that no rational fact-finder could have found the factor to apply. *Lewis v. Jeffers*, 497 U.S. 764, 779, 110 S.Ct. 3092, 3102, 111 L.Ed.2d 606 (1990).

Petitioner argues that it was error for the Arizona Supreme Court to have "reasonably assumed" that Ken Hartsock underwent physical suffering in the course of being stabbed twenty-four times. He complains that the Court did not make, beyond a reasonable doubt, a specific finding of fact. Yet the trial court made such an explicit pronouncement, and in reviewing the record, the Arizona Supreme Court found sufficient evidence to uphold that finding. *LaGrand (Walter)*, 153 Ariz. at 36, 734 P.2d at 579. In the same way, the Arizona Supreme Court found sufficient evidence in the record to uphold the trial court's finding of heinous and depraved factors. *Id.* Clearly, there is no constitutional error here.

Pecuniary gain aggravating factor

[28, 29] Petitioner argues that the Arizona Supreme Court misapplied its own standard for finding pecuniary gain, and in this case applied an overly broad definition. In determining whether a state court's application of a constitutionally permissible aggravating factor was so erroneous as to raise an independent due process or Eighth Amendment violation, the standard of review is whether any rational finder of fact could have reached the same conclusion. *Lewis v. Jeffers*, 497 U.S. at 779, 110 S.Ct. at 3102. Here, the sentencing court found beyond a reasonable doubt that the murder was motivated by the expectation of the receipt of something of value, and the Arizona Supreme Court concurred with this finding. The Arizona Supreme Court stated that Petitioner's goal of robbing the bank so permeated Petitioner's conduct that the murder can be deemed to have been committed in furtherance of that goal. *LaGrand (Walter)*, 153 Ariz. at 36, 734 P.2d at 578. As that conclusion is neither irrational nor arbitrary, there is no constitutional violation.

[30] Petitioner also argues that the Arizona Supreme Court expanded its definition of pecuniary gain in his case, and its application to him violates the Due Process Clause

because it is analogous to an *ex post facto* law. Even if the Arizona Supreme Court did expand its definition of pecuniary gain in his case, relief is not warranted. While a state court's construction can so broaden a criminal statute that its application in the very case it is announced would violate the Due Process Clause, *Bouie v. City of Columbia,* 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964), that is not the case here. Petitioner was on notice that if he committed murder, and a rational court found it to have been committed for pecuniary gain, he risked being sentenced to death. This is all the notice that the Constitution requires. That murderers ought to be able to legally rely on existing case law precisely defining aggravating factors is much too fine a legal argument to withstand scrutiny. Such a rule would not vindicate the interest sought to be protected by prohibiting *ex post facto* laws: that reasonable people conform their conduct to the law, and conduct which conformed at the time committed ought not to be punished because the law was later changed. This premise does not apply here because first, any refinement in the Arizona Supreme Court's interpretation of pecuniary gain is not of such substantive quality as to trigger *ex post facto* concerns and, in any event, it is doubtful that murderers conform their behavior to avoid current notions of aggravating factors. Petitioner has failed to show otherwise.

Prior criminal record as aggravating factor

This claim was dismissed on the merits in the previous order of this Court dealing with the issues of cause and prejudice.

WALTER LAGRAND'S PETITION

The remainder of this order addresses only claims unique to Petitioner Walter LaGrand's petition. Any claims raised in Walter LaGrand's petition that the Court has already discussed in the context of Karl LaGrand's petition are denied for the same reasons and are not set forth below.

Exclusion of Karl LaGrand's confession

Petitioner Walter LaGrand's first argument is that the trial court and Arizona Supreme Court committed errors of constitutional dimensions when they ruled that Karl LaGrand's confessions were inadmissible under Arizona's Rule of Evidence 804(b)(3)'s exception to the hearsay rule.[5]

Karl LaGrand made two separate confessions on the day of his arrest. In his confessions, Karl LaGrand assumes sole responsibility for stabbing Ken Hartsock, which he said occurred after Mr. Hartsock provoked him by kicking him in the leg. These confessions exonerate Petitioner Walter LaGrand because they place him outside the room where the murder occurred.

Petitioner was prevented from introducing these confessions at trial because the trial court ruled that they did not meet Rule 804(b)(3)'s test for reliability.[6] While the Arizona Supreme Court concluded that the trial court's ruling was correct, it announced and applied to these facts a new judicial interpretation of Rule 804(b)(3). The Supreme Court compiled a list of seven nonexclusive factors that might bear on the reliability of a hearsay confession, but limited the review allowed to a judge to corroborating and contradicting evidence appearing in the record "because this factor alone, unlike all other factors, in and of itself directly suggests trustworthiness or lack thereof." *State*

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[5] Rule 804 of Arizona's Rules of Evidence is the same as Rule 804 of the Federal Rules of Evidence. Rule 804(b)(3) reads:

Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement

[6] Petitioner also argues that this evidence should have been admitted pursuant to Rule 804(b)(5)'s catch-all exception to the hearsay rule. However, Rule 804(b)(5) only applies if the proffered statement is not covered under any other exception. Here, the statement is covered under Rule 804(b)(3): *United States v. Thomas,* 919 F.2d 495, 498 (8th Cir.1990).

v. LaGrand (Walter), 158 Ariz. at 28 n. 3, 734 P.2d at 570 n. 3. The Court then applied this test, comparing Karl LaGrand's confessions to other evidence in the record corroborating and contradicting the statements, determined that a reasonable person could not conclude that his statements could be true, and so upheld the trial court's exclusion of the statements. The overwhelming quantum of evidence against both Karl and Walter LaGrand is detailed in *State v. LaGrand (Walter), supra,* and is supplemented by this order. That evidence included eyewitness testimony describing the joint assault upon Ken Hartsock. The eyewitness, who was a bank employee held captive by Karl and Walter LaGrand, described Karl LaGrand holding Mr. Hartsock from behind while Walter LaGrand assaulted him from the front. All of Ken Hartsock's twenty-four stab wounds were frontal, despite the fact his hands were taped behind his back. It is virtually inconceivable that wounds of this nature and location would have occurred without someone or something holding him in place. In this regard, during the sentencing hearing, the prosecutor argued:

> And I would like the Court to . . . review the evidence showing the number of wounds that Ken Hartsock had and the location of the wounds on Ken Hartsock's body. . . . [N]ote how they're all located on the front, around the throat and down the frontal chest. . . . And think what a person is going to do, particularly a person who's being attacked by one individual when one individual begins to stab them. Are they going to be wounded in such a way throughout 26 wounds that the wounds are all frontal? Are they going to protect themselves? Are they going to turn, as Dawn Lopez did?
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> . . . The position of Ken Hartsock's body and the location of the wounds on his body are exactly in conformity with the way in which Dawn Lopez said he was attacked, one person holding him from behind and another person stabbing him.

[31] Petitioner Walter LaGrand contests the constitutionality of this rule of evidence. He argues that in excluding the hearsay confessions, the Arizona courts have prevented him from being able to present a complete defense, thereby violating his right to due process. *California v. Trombetta,* 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). It is true that state rules of evidence can sweep too broadly in excluding evidence that would otherwise appear trustworthy and thus deprive an accused of his right of due process. *Washington v. Texas,* 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) (rule prohibiting a co-defendant from testifying on behalf of accused unconstitutional); *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) ("vouching" rule preventing an accused from impeaching his own witness, when combined with rule preventing admissibility of hearsay declarations made against penal interest, unconstitutional); *Green v. Georgia,* 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979) (rule preventing admissibility of hearsay declarations made against penal interest at sentencing phase of trial where state had relied on same hearsay declaration in convicting co-defendant, unconstitutional); *Crane v. Kentucky,* 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (rule, unique in nation, preventing an accused from offering evidence that would allow a jury to disbelieve his confession, on the grounds that the judge had already determined the confession to be voluntary, unconstitutional).

[32] Petitioner suggests that this line of cases stands for the broad proposition that any state rule of evidence excluding evidence offered by an accused is subject to intense constitutional scrutiny. The law is otherwise. First, the Court is impressed with the very narrow language used in those cases. *Chambers,* 410 U.S. at 303, 93 S.Ct. at 1049 ("under the facts and circumstances of this case"); *Green,* 442 U.S. at 97, 99 S.Ct. at 2151 ("In these unique circumstances"); *Crane,* 476 U.S. at 690, 106 S.Ct. at 2147 ("In the absence of any valid state justification"). Second, the Due Process Clause has limited applicability to state rules of evidence. *Estelle v. McGuire,* 502 U.S. 62, 72, 112 S.Ct. 475, 482, 116 L.Ed.2d 385 (1991) ("The Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules.")

Lastly, Petitioner's evidence was excluded here not due to any broad, mechanistically-applied rule, but rather because it was deemed so unreliable as to prevent a reasonable person from possibly believing it. *State v. LaGrand (Walter)*, 153 Ariz. at 29, 734 P.2d at 571. This rationale clearly distinguishes this case from those cited by Petitioner. *Crane*, 476 U.S. at 690, 106 S.Ct. at 2146 ("we have never questioned the power of the States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see that evidence admitted"). Therefore, even though the Arizona Supreme Court's newly-announced test interpreting Rule 804(b)(3)'s requirement of reliability may differ from those employed by other states, and some federal circuits, the Court concludes that it is not constitutionally defective.

Next, Petitioner argues that the Arizona Supreme Court misapplied its own rule. In this argument, Petitioner misunderstands the role of a federal court conducting habeas review. "[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle*, 502 U.S. at 67, 112 S.Ct. at 480. Here, Petitioner argues that the Arizona Supreme Court should have looked more deeply at the record and found other areas of corroboration that supported the reliability of the confessions. Respondents point out that there were also further areas of contradiction not taken into account in the Arizona Supreme Court's calculus. Yet, it is not the province of this Court to reweigh the corroborating and contradicting factors and impose its analysis on the state courts. *Id.* It is enough that the Arizona Supreme Court's weighing and balancing was rational and not arbitrary. Having determined that the rule itself does not violate the Due Process Clause of the Constitution and that the Arizona Supreme Court rationally applied the rule, this Court's inquiry is at an end.

Lesser included offense instruction

Petitioner contests the constitutionality of Arizona's felony murder statute, A.R.S. § 13-1105(A)(2), which has no lesser included offense. Petitioner concedes that this claim was decided adversely to him by *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991), but that as *Schad* was decided 5–4, he is raising this issue now in order to preserve it. On the authority of *Schad*, the Court will deny this claim.

Mitigating evidence not considered by sentencing court

[33] Petitioner argues that the sentencing court failed to adequately consider that he was not primarily responsible for the murder. He claims that it was error for the court to have ruled Karl LaGrand's confession unreliable, and then not to have considered it for sentencing purposes. For the reasons stated above, the Court does not agree with Petitioner that the court committed error when it excluded the confessions. Nor does the Court agree that the court did not consider it at sentencing.

At the aggravation hearing, the prosecutor argued that the court, as sentencer, needed to make a factual finding in order to pass sentence on Petitioner. Either the murder occurred the way eyewitness Dawn Lopez said it did, with both Petitioners personally involved, or it occurred the way Karl LaGrand said it did in his confessions, with Karl LaGrand being the lone perpetrator. The trial court was persuaded, beyond a reasonable doubt, that the crime was premeditated and that both Karl and Walter LaGrand were personally involved. Petitioner's argument was considered, but was rejected. This Court will not overturn that finding on collateral review absent a showing of manifest error, which Petitioner has not done.

CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that all of Petitioners' claims preserved for review on the merits **ARE DENIED WITH PREJUDICE**, with the exception of the issue of the constitutionality of lethal injection as a method of execution.

Karl Hinze LaGRAND, Petitioner,

v.

Samuel LEWIS, et al., Respondents.

Walter Burnhart LaGRAND, Petitioner,

v.

Samuel LEWIS, et al., Respondents.

No. CV 92-026 TUC JMR.

United States District Court,
D. Arizona.

March 30, 1995.

Petitioners' convictions for first-degree murder, first-degree attempted murder, attempted armed robbery, and kidnapping were affirmed by the Supreme Court of Arizona, 152 Ariz. 483, 733 P.2d 1066 and 153 Ariz. 21, 734 P.2d 563. Petitioners sought habeas corpus relief. The District Court, 883 F.Supp. 451, denied claims, except for challenge to lethal injection as form of execution. On that issue, the District Court, Roll, J., held that execution by lethal injection was not cruel and unusual punishment.

Summary judgment for government defendants; habeas corpus denied.

1. Criminal Law ⟹1213.8(8)

One focus of inquiry into whether particular form of execution constitutes cruel and unusual punishment is whether challenged method was accepted at time Bill of Rights was passed; inquiry is not dispositive, however, as challenged method must also be weighed against evolving standards of decency that mark progress of maturing society. U.S.C.A. Const.Amend. 8.

2. Criminal Law ⟹1213.8(8)

Inquiry into whether particular form of execution constitutes cruel and unusual punishment must focus on objective factors to maximum extent possible. U.S.C.A. Const. Amend. 8.

3. Criminal Law ⟹1213.8(8)

One factor in determining whether particular form of execution constitutes cruel and unusual punishment is that passage of challenged method by society's representatives accords that method presumption of constitutionality. U.S.C.A. Const.Amend. 8.

4. Criminal Law ⟹1213.8(8)

Factor in determining whether particular form of execution is cruel and unusual punishment is quantum of pain that condemned must endure in process of being executed; in cases challenging methodology of execution this is more important factor than presumption of constitutionality accorded when challenged method is passed by society's representatives. U.S.C.A. Const. Amend. 8.

5. Criminal Law ⟹1213.8(8)

Execution by lethal injection did not violate constitutional prohibition against cruel and unusual punishment, notwithstanding claim that written procedures for carrying out such executions were not sufficiently detailed, as procedures required that executions be conducted under direction of health administrator, that knowledgeable personnel be used, and that physician be present, and lethal injection comported with current societal norms. U.S.C.A. Const.Amend. 8.

Carla G. Ryan, Tucson, AZ, Lawrence B. Weeks, Berkeley, CA, and Bruce A. Burke, Tucson, AZ, for plaintiffs.

Grant Woods, Atty. Gen. and Diane M. Ramsey, Asst. Atty. Gen., Crim. Appeals Section, Phoenix, AZ, for defendants.

ORDER

ROLL, District Judge.

Pending before the Court is petitioners' challenge to the constitutionality of lethal

Annex MG 10

UNITED STATES COURT OF APPEALS (NINTH CIRCUIT), *KARL AND WALTER LAGRAND* V. *STEWART*
(16 JANUARY 1998).
SOURCE: 133 *FEDERAL REPORTER* 1253-1279

principal as a direct and active perpetrator solely through his personal use of a knife." *Santamaria*, 8 Cal.4th at 932, 35 Cal.Rptr.2d 624, 884 P.2d 81 (emphasis added).

Moreover, the majority opinion does not apply collateral estoppel with "realism and rationality" when it allows the prosecution to relitigate the issue whether Santamaria personally used a knife to commit murder based on the ephemeral possibility that the jury on retrial may decide that the defendant is guilty of murder resulting from knife use under the "either-or" theory. Here, the prosecution states unequivocally that the available evidence only supports a theory that the defendant was not an aider and abettor but directly used the knife to commit murder. The prosecution thus admits that it will proceed under the theory that the defendant directly used the knife, and implicitly, will not proceed on the "either-or" theory regarding knife use because the prosecution concedes that it will not seek to prove that Santamaria was an aider or abettor.

While the "either or" theory is an option available under California law for cases where it is unclear which of two or more defendants played a specific role in a crime, this option should not be used as a ploy to deny Santamaria the right to be protected under the double jeopardy clause when realism and rationality dictate that the "either-or" theory is inapplicable to his case.

For the reasons stated above, I respectfully dissent.

Karl Hinze LaGRAND, Petitioner-Appellant,

v.

Terry STEWART,* Director, Arizona Department of Corrections, Respondent-Appellee.

Walter Burnhart LaGRAND, Petitioner-Appellant,

v.

Terry STEWART,* Director, Arizona Department of Corrections, Respondent-Appellee.

Nos. 95-99010, 95-99011.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted March 22, 1996.

Decided Jan. 16, 1998.

Following affirmance of murder convictions and death sentences, 733 P.2d 1066, petitions for writs of habeas corpus were filed. The United States District Court for the District of Arizona, John M. Roll, J., 883 F.Supp. 451 and 883 F.Supp. 469, denied petitions. Petitioners appealed. The Court of Appeals, T.G. Nelson, Circuit Judge, held that: (1) finding of expectation of pecuniary gain as aggravating factor was neither arbitrary nor capricious; (2) jury was not forced into "all-or-nothing" choice between capital murder and innocence; (3) rational sentencer could have imposed death penalty; (4) one petitioner's statement that other petitioner was not involved in stabbing was not admissible as statement against interest; (5) counsel were not ineffective; and (6) one petitioner's request for new trial counsel was properly denied.

Affirmed.

Pregerson, Circuit Judge, issued dissenting opinion.

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* Terry Stewart is substituted for Samuel A. Lewis, his predecessor, as Director, Arizona Department of Corrections, pursuant to Fed. R.App. P. 43(c).

1. Homicide 🔑357(9)

Finding of expectation of pecuniary gain as aggravating factor was neither arbitrary nor capricious in capital murder prosecution arising from bungled bank robbery attempt; sole purpose of defendants' journey to bank was to rob it, and defendants threatened victims with death in order to obtain entry to vault.

2. Constitutional Law 🔑203, 270(2)

Homicide 🔑357(9)

Finding of expectation of pecuniary gain as aggravating factor in capital murder prosecution arising from bungled bank robbery attempt did not violate ex post facto or due process clauses, despite claim that Arizona Supreme Court, in saying that intent to rob "infects" all other actions, effectively wiped out any requirement to prove aggravating factor beyond reasonable doubt; Arizona statutory scheme clearly provided for result in question at time of offense, and Arizona Supreme Court had not narrowed clear terms of statutes to robber's benefit. U.S.C.A. Const. Art. 1, § 10, cl. 1; Amend. 14; A.R.S. §§ 13-703(F)(5), 13-1105(A)(2).

3. Habeas Corpus 🔑404, 405.1

Court of Appeals may address merits of procedurally defaulted claim if petitioner can show cause for procedural default and actual prejudice as result of alleged violations of federal law; to demonstrate cause, petitioner must show existence of some objective factor external to defense which impeded counsel's efforts to comply with state's procedural rule. 28 U.S.C.A. § 2254.

4. Habeas Corpus 🔑401

Lacking cause and prejudice, federal habeas court may nonetheless consider procedurally barred claims if failure to do so would result in conviction or execution of one who is actually innocent. 28 U.S.C.A. § 2254.

5. Habeas Corpus 🔑406, 409

Court of Appeals would not address habeas petitioners' procedurally defaulted claim that, because they were German nationals, they were entitled to contact German consulate upon being arrested and that Arizona authorities' failure to inform them of that right violated their constitutional rights; although first petitioner claimed that ineffectiveness of trial counsel resulted in failure to present that claim to state courts, he did not show that any external factor prevented his counsel in state post-conviction relief (PCR) proceeding from presenting that claim, second petitioner waived his right to present ineffective assistance of counsel claims, and, while petitioners claimed that failure to notify them of their right to contact German consulate blocked their ability to gather mitigating evidence, such evidence did not go to eligibility for death penalty. U.S.C.A. Const. Amend. 6.

6. Homicide 🔑308(2)

Refusal of defendants' requested second-degree murder instruction as lesser-included offense to felony murder charge did not force jury into "all-or-nothing" choice between capital murder and innocence; jury was told it could return verdicts of guilty of murder in first degree, murder in second degree, or not guilty, and that crime could be committed as felony murder or as premeditated murder, and instruction on second-degree murder was given, as was possible verdict of second-degree murder.

7. Habeas Corpus 🔑508

In reviewing claim that state court which imposed death penalty did not adequately consider mitigating evidence, federal habeas court asks whether, considering aggravating and mitigating circumstances, rational fact-finder could have imposed death penalty.

8. Homicide 🔑357(4, 5, 9, 11)

Rational sentencer could have imposed death penalty in first-degree murder prosecution, despite mitigating factors, such as defendants' ages (18 and 19), their prior home life, and their remorse; aggravating circumstances of pecuniary gain, murder committed in especially heinous, cruel or depraved manner, and prior conviction of felony involving use or threat of violence were well supported in record.

9. Habeas Corpus 🔑500.1

If state supreme court undertook its proportionality review in death penalty case in good faith and found that sentence was proportional to sentences imposed in similar cases, constitution does not require federal habeas court to look behind that conclusion.

10. Habeas Corpus 🔑725

Record did not support habeas petitioners' claim that existence of aggravating factor of "cruel, heinous or depraved" was assumed to exist, rather than being found beyond reasonable doubt; state courts premised their finding of "cruel, heinous or depraved" upon specific evidence of victim's physical and mental suffering, petitioners' infliction of gratuitous violence upon and mutilation of victim, and victim's position of helplessness.

11. Habeas Corpus 🔑223

Habeas petitioners' claim that lethal gas was unconstitutional method of execution was not ripe, as they would be executed by lethal gas only if they affirmatively choose to do so. A.R.S. § 13-704(B).

12. Criminal Law 🔑1208.1(4.1)

Lethal injection is constitutional method of execution.

13. Criminal Law 🔑422(5)

Codefendant's confession that he stabbed victim and that defendant did not stab anyone, and was not present when stabbings occurred, did not fit within Arizona's hearsay exception for "statements against interest," and thus, defendant could not introduce that confession, which had been excluded as to codefendant; reliability that attended inculpatory part of codefendant's confession did not afford any reliability to that part of statement that merely exculpated defendant, and evidence contradicted codefendant's statement that defendant was not involved in stabbing. 17A A.R.S. Rules of Evid., Rule 804(b)(3).

See publication Words and Phrases for other judicial constructions and definitions.

14. Criminal Law 🔑417(15)

Judge's inquiry, made to ensure that corroboration requirement for admission of statement against interest has been satisfied under Arizona law, should be limited to asking whether evidence in record corroborating and contradicting declarant's statement would permit reasonable person to believe that statement could be true; if judge believes that reasonable person could so conclude, then judge must admit statement into evidence. 17A A.R.S. Rules of Evid., Rule 804(b)(3).

15. Criminal Law 🔑417(15)

Because "statements against penal interest" exception to hearsay rule is premised upon inherent reliability of statements that tend to incriminate declarant, statement that includes both incriminating declarations and corollary declarations that, taken alone, are not inculpatory of declarant, must be separated and only that portion that is actually incriminating of declarant admitted under exception. 17A A.R.S. Rules of Evid., Rule 804(b)(3).

16. Criminal Law 🔑417(15)

Exculpatory statements of family members are not considered to be highly reliable, for purposes of hearsay exception for statements against interest. 17A A.R.S. Rules of Evid., Rule 804(b)(3).

17. Constitutional Law 🔑266(1)

Criminal Law 🔑417(15)

Standard of "clearly" indicating trustworthiness of statement against interest is not so onerous a burden as to violate due process. U.S.C.A. Const.Amend. 14; 17A A.R.S. Rules of Evid., Rule 804(b)(3).

18. Habeas Corpus 🔑690

Habeas petitioner's waiver of employment of new counsel to potentially pursue claims of ineffectiveness of trial counsel precluded petitioner from thereafter claiming that such waiver was ineffective because he did not know facts constituting his claim. U.S.C.A. Const.Amend. 6.

19. Habeas Corpus 🔑842

Claim of ineffective assistance of counsel presents mixed question of law and fact which Court of Appeals reviews de novo. U.S.C.A. Const.Amend. 6.

20. Habeas Corpus 🔑746

In capital case, petitioner is entitled to evidentiary hearing where there has been no state court evidentiary hearing and petitioner raises "colorable" claim of ineffective assistance. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254.

21. Habeas Corpus ⇐752.1

Scope of evidentiary hearing with respect to habeas petitioner's claim of ineffective assistance of counsel is committed to discretion of district court. U.S.C.A. Const. Amend. 6; 28 U.S.C.A. § 2254.

22. Habeas Corpus ⇐752.1

Where habeas petitioner who alleged ineffectiveness of counsel failed to show at evidentiary hearing that counsel's performance was deficient, court was not required to consider whether petitioner was prejudiced. U.S.C.A. Const.Amend. 6; 28 U.S.C.A. § 2254.

23. Habeas Corpus ⇐753

At evidentiary hearing on habeas petitioner's claim of ineffective assistance of counsel, restriction on petitioner's presentation of expert medical and legal testimony regarding his trial counsel's performance was proper; court allowed petitioner to present testimony of five attorneys regarding standard of care, and majority of proffered expert testimony rejected by court went to second prong of *Strickland* test, which was not subject of hearing. U.S.C.A. Const. Amend. 6; 28 U.S.C.A. § 2254.

24. Criminal Law ⇐641.13(2.1)

Counsel was not ineffective in capital murder prosecution for failing to pursue defense of impulsivity to charge of premeditated murder; evidence belied that defense, impulsivity was absolutely no defense to felony-murder charge, which was state's principal claim, and pursuit of impulsivity defense would have necessarily brought defendant's prior record into case. U.S.C.A. Const. Amend. 6.

25. Criminal Law ⇐641.13(2.1)

Counsel was not ineffective in capital murder prosecution for failing to pursue defense of insanity; defendant was examined by psychologist and psychiatrist, neither of whose reports suggested insanity defense was available to defendant, and pursuing insanity defense would have made defendant's lengthy and violent criminal history admissible. U.S.C.A. Const.Amend. 6.

26. Criminal Law ⇐641.13(7)

Counsel was not ineffective at sentencing phase of capital murder trial for successfully seeking admittance of defendant's confessions, which had been excluded at guilt phase for lack of *Miranda* warnings; confessions revealed less egregious crime than that presented by eyewitness testimony, sentencing was to be done by trial judge, who had already heard eyewitness's testimony, and, in absence of confessions, sentencer would have no record evidence of defendant's conduct except that of eyewitness. U.S.C.A. Const. Amend. 6.

27. Criminal Law ⇐641.13(6)

Counsel was not ineffective in capital murder prosecution for failing to interview all witnesses and examine them at trial; all witnesses had been interviewed before counsel was appointed to represent defendant, counsel reviewed transcripts of these interviews and personally interviewed the only eyewitness, and, although counsel cross-examined only two of 18 witnesses called by government, co-defendant's counsel cross-examined each of state's witnesses prior to defendant's counsel having that opportunity, and all parties agreed that co-defendant's counsel did exceptional job. U.S.C.A. Const. Amend. 6.

28. Criminal Law ⇐641.13(2.1)

Failure to make opening statement in capital murder prosecution did not render counsel ineffective; counsel did not waive opening statement, but rather chose to reserve it and wait until he heard all of state's evidence before making opening statement, counsel chose not to put on any witnesses after closing of state's case, and counsel thus lost opportunity to give opening statement, which was reasonable strategic decision. U.S.C.A. Const.Amend. 6.

29. Criminal Law ⇐641.13(1)

In considering claim of ineffective assistance of counsel, it is not experience of attorney that is evaluated, but rather, his performance. U.S.C.A. Const.Amend. 6.

30. Criminal Law ⇐641.13(7)

Counsel was not ineffective for failing to competently investigate, prepare and present evidence at mitigation hearing in capital murder prosecution; counsel called psychiatrist to testify about defendant's impulsiveness and introduced report by clinical psychologist.

counsel introduced defendant's confessions into evidence because he thought they presented less egregious account of events than eyewitness account, and co-defendant's counsel introduced extensive mitigation evidence which applied equally to both defendant and co-defendant. U.S.C.A. Const.Amend. 6.

31. Estoppel 🔑62.2(2)

State was not estopped from continuing to argue that habeas petitioner's trial counsel provided effective assistance, even though, when petitioner submitted trial counsel's affidavit in support of petitioner's ineffectiveness claim, state sent copy of affidavit to Arizona State Bar, pursuant to obligations under State Bar's Ethical Rules, suggesting that trial counsel had admitted violation of Ethical Rules requiring competent representation; state's belief that it had ethical obligation to bring counsel's admission to bar's attention should not preclude state from continuing to contend, as it had throughout, that petitioner received adequate representation. U.S.C.A. Const.Amend. 6.

32. Criminal Law 🔑641.10(2)

Capital murder defendant's request for new trial counsel, on ground that counsel had failed to come to prison to visit defendant in order to discuss defense which defendant wished to use, was properly denied; record did not disclose total failure of communication. U.S.C.A. Const.Amend. 6.

33. Criminal Law 🔑1134(3)

In reviewing rejection of defendant's request for new counsel, Court of Appeals looks at timeliness of request, adequacy of trial court's inquiry, and whether conflict between defendant and his attorney was so great that it resulted in total lack of communication between them. U.S.C.A. Const. Amend. 6.

34. Criminal Law 🔑641.8

Capital murder defendant's request for new counsel, filed 45 days before trial, was timely. U.S.C.A. Const.Amend. 6.

35. Criminal Law 🔑641.10(2)

Capital murder defendant was not entitled to appointment of new lawyer to represent him in his request for change in trial counsel. U.S.C.A. Const.Amend. 6.

Carla G. Ryan, Tucson, Arizona, and Lawrence B. Weeks, Coolidge, Arizona, for petitioner-appellant Karl Hinze LaGrand.

Bruce A. Burke, Tucson, Arizona, for petitioner-appellant Walter LaGrand.

Paul J. McMurdie, Deputy Attorney General, Phoenix, Arizona, for respondents-appellees.

Appeals from the United States District Court for the District of Arizona; John M. Roll, District Judge, Presiding. D.C. No. CV-92-00026-JMR.

Before: HUG, Chief Judge, and PREGERSON and T.G. NELSON, Circuit Judges.

Opinion by Judge T.G. NELSON; Dissent by Judge PREGERSON.

T.G. NELSON, Circuit Judge:

Arizona death row inmates Walter and Karl LaGrand appeal the district court's denial of their petitions for writ of habeas corpus. We have jurisdiction of these consolidated appeals pursuant to 28 U.S.C. § 1291, and we affirm.

I

FACTS AND PROCEDURAL HISTORY

Walter LaGrand (Walter) and Karl LaGrand (Karl) (collectively "the LaGrands") were each convicted of first-degree murder, attempted murder in the first degree, attempted armed robbery and two counts of kidnapping. The Arizona Supreme Court gave this account of the crimes in Walter's appeal:

> This case arises from a series of events which occurred during a bungled attempt to rob the Valley National Bank in Marana, Arizona, on January 7, 1982. That morning Walter and Karl LaGrand drove from Tucson, where they lived, to Marana intending to rob the bank. They arrived in Marana sometime before 8:00 a.m. Because the bank was closed and empty the LaGrands drove around Marana to pass time. They eventually drove to the El Taco restaurant adjacent to the bank.

Ronald Schunk, manager of El Taco, testified that he arrived at work at 7:50 a.m. The moment he arrived, a car with two men inside drove up to the El Taco. Schunk described the car as white with a chocolate-colored top. The car's driver, identified by Schunk as Walter LaGrand, asked Schunk when the El Taco opened. Schunk replied, "Nine o'clock." The LaGrands then left.

Dawn Lopez arrived for work at the bank at approximately 8:00 a.m. When she arrived at the bank she noticed three vehicles parked in the parking lot: a motor home; a truck belonging to the bank manager, Ken Hartsock; and a car which she did not recognize but which she described as white or off-white with a brown top. Because Lopez believed that Hartsock might be conducting business and desire some privacy she left the parking lot and drove around Marana for several minutes. She returned to the bank and noticed Hartsock standing by the bank door with another man whom she did not recognize. Lopez parked her car and walked toward the bank entrance where Hartsock was standing. As she passed the LaGrands' car Walter emerged from the car and asked her what time the bank opened. Lopez replied, "Ten o'clock." Lopez continued walking and went into the bank. When she entered the bank she saw Hartsock standing by the vault with Karl LaGrand. Karl was wearing a coat and tie and carrying a briefcase. Karl told her to sit down and opened his jacket to reveal a gun, which was later found by the police to be a toy pistol. Walter then came through the bank entrance and stood by the vault. Lopez testified that Walter then said, "If you can't open it this time, let's just waste them and leave." Hartsock was unable to open the vault because he had only one-half of the vault combination.

The LaGrands then moved Lopez and Hartsock into Hartsock's office where they bound their victims' hands together with black electrical tape. Walter accused Hartsock of lying and put a letter opener to his throat, threatening to kill him if he was not telling the truth. Lopez and Hartsock then were gagged with bandannas.

Wilma Rogers, another bank employee, had arrived at the bank at approximately 8:10 a.m. Upon arriving Rogers noticed two strange vehicles in the parking lot and, fearing that something might be amiss, wrote down the license plate numbers of the two unknown vehicles. She then went to a nearby grocery store and telephoned the bank. Lopez answered the phone after her gag was removed; her hands remained tied. Karl held the receiver to Lopez' ear and listened to the conversation. Lopez answered the phone. Rogers asked for Hartsock but Lopez denied that he was there, which struck Rogers as odd because she had seen his truck in the bank parking lot. Rogers then told Lopez that her car headlights were still on, as indeed they were. Rogers told Lopez that if she did not go out to turn her headlights off, then she would call the sheriff. A few minutes later Rogers asked someone else to call the bank and they also were told that Hartsock was not there. Rogers then called the town marshal's office.

After the first telephone call the LaGrands decided to have Lopez turn off her headlights. Her hands were freed and she was told to go turn off the lights but was warned that "If you try to go-if you try to leave, we'll just shoot him and leave. We're just going to kill him and leave." Lopez went to her car and turned off the lights. Upon her return to the bank her hands were retied. Hartsock was still bound and gagged in the same chair. Lopez was seated in a chair, and turned toward a corner of the room. Lopez testified that soon thereafter she heard sounds of a struggle. Fearing that Hartsock was being hurt, Lopez stood up, broke the tape around her hands and turned to help him. Lopez testified that for a few seconds she saw Hartsock struggling with two men. Karl was behind Hartsock holding him by the shoulders while Walter was in front. According to Lopez, Walter then came toward her and began stabbing her. Lopez fell to the floor where she could see only the scuffling of feet and Hartsock lying face down on the floor. She then heard someone twice say, "Just make sure he's dead."

> The LaGrands left the bank and returned to Tucson. Lopez was able to call for help. When law enforcement and medical personnel arrived at the bank Hartsock was dead. He had been stabbed 24 times. Lopez, who had also been stabbed multiple times, was taken to University Hospital in Tucson.
>
> Law enforcement personnel quickly identified the LaGrands as suspects. By 3:15 p.m., police had traced the license plate number to a white and brown vehicle owned by the father of Walter's girl friend, Karen Libby. The apartment where the LaGrands were staying with Karen Libby was placed under surveillance. Shortly thereafter Walter, Karl and Karen Libby left the apartment and began driving. They were followed and soon pulled over. Walter and Karl were then arrested and the car was searched. Karen Libby's apartment was also searched and a steak knife similar to one found at the bank was seized. Karl's fingerprint was found at the bank. A briefcase containing a toy gun, black electrical tape, a red bandanna, and other objects was found beneath a desert bush and turned over to the police.

State v. LaGrand, 153 Ariz. 21, 734 P.2d 563, 565–66 (1987).

When questioned after their apprehension, Walter made no statements, but Karl confessed to the crimes in two different statements. He stated that he had stabbed Hartsock and Lopez, but that Walter had not stabbed anyone and that Walter had been out of the room at the time. Following a jury trial, both were convicted on all charges. After considering mitigating and aggravating circumstances,[1] the judge sentenced both defendants to death. The Arizona Supreme Court affirmed the convictions and sentences. *State v. Karl LaGrand*, 152 Ariz. 483, 733 P.2d 1066 (1987); *State v. Walter LaGrand*, *supra*. The Supreme Court of the United States denied certiorari. 484 U.S. 872, 108 S.Ct. 206, 98 L.Ed.2d 157 (1987).

The LaGrands then filed post-conviction relief petitions in the Arizona Superior Court (trial court) which were denied in 1989. The Arizona Supreme Court denied review as did the United States Supreme Court. 501 U.S. 1259, 111 S.Ct. 2910, 2911, 115 L.Ed.2d 1074 (1991). The LaGrands then filed petitions for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The district court, in a series of orders, denied relief, *LaGrand v. Lewis*, 883 F.Supp. 469 (D.Ariz.1995), *LaGrand v. Lewis*, 883 F.Supp. 451 (D.Ariz.1995), and these timely appeals followed.

Additional facts necessary to the discussion of the several issues are contained in the portions of this opinion in which the issues are addressed.

II

JOINT ISSUES

Walter and Karl raise a number of issues jointly, which we discuss prior to reaching their individual claims.

A. *The Pecuniary Gain Factor*

[1] Two related arguments are advanced relative to the trial court's finding of expectation of pecuniary gain as an aggravating factor. *First*, the LaGrands contend that the finding of pecuniary gain was arbitrary or irrational. The trial court's finding was affirmed by the Arizona Supreme Court in its independent review. That court said:

> We do not believe the defendant must intend beforehand to kill as well as to rob to satisfy the statute. A.R.S. § 13-703(F)(5). Nor do we believe that an absence of actual receipt of money or valuables negates a finding of expectation of pecuniary gain as an aggravating circumstance.
>
> In this case, the attempted robbery permeated the entire conduct of the defendant. The defendant may have reacted irrationally to the failure or inability of the

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[1] The court found that the following aggravating circumstances were proven beyond a reasonable doubt: prior conviction of a felony involving the use or threat of violence on another person, expectation of pecuniary gain, and commission of the crime in an especially heinous, cruel or depraved manner. *State v. Walter LaGrand*, 153 Ariz. at 34–36, 734 P.2d at 576–77; *State v. Karl LaGrand*, 152 Ariz. 483, 488–89, 733 P.2d 1066, 1072 (1987). The court considered three mitigating factors: defendants' ages (18 and 19), their prior home lives, and their remorse. *Id.*

victim to open the safe but the murder was neither accidental nor unexpected. The reason defendant was there was his expectation of pecuniary gain and the reason he stabbed the victim was because the victim was unable to open the safe, frustrating defendant's continuing attempt for pecuniary gain. The defendant's goal of pecuniary gain caused the murder and the murder was in furtherance of his goal. We agree with the trial court's finding that the defendant's expectation of pecuniary gain was an aggravating factor.

State v. LaGrand, 153 Ariz. at 36, 734 P.2d at 578 (footnote omitted).

Lewis v. Jeffers, 497 U.S. 764, 780, 110 S.Ct. 3092, 3102, 111 L.Ed.2d 606 (1990), a case arising in Arizona, held that federal court review of such a finding by the state court "is limited, at most, to determining whether the state court's finding was so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." The Court went on to say:

> A state court's finding of an aggravating circumstance in a particular case-including a de novo finding by an appellate court that a particular offense is "especially heinous ... or depraved"-is arbitrary or capricious if and only if no reasonable sentencer could have so concluded.

Id. at 783, 110 S.Ct. at 3103.

Here, the sole purpose of the journey to the bank was to rob it. The LaGrands threatened the victims with death in order to obtain entry to the vault. In fact, Walter LaGrand admitted in his trial testimony that he held a letter opener to Ken Hartsock's neck as a threat. A rational sentencer could have found the existence of the pecuniary gain aggravating factor.

[2] *Second*, the LaGrands argue that the Arizona Supreme Court broadened the definition of pecuniary gain in violation of both the Due Process Clause and the Ex Post Facto Clause of the Constitution. Their basic argument is that the Arizona Supreme Court, in saying that the intent to rob "infects" all other actions, "effectively wipes out any requirement to prove the aggravating factor beyond a reasonable doubt."

The Ex Post Facto Clause does not apply to court decisions construing statutes. "The *Ex Post Facto* Clause is a limitation upon the powers of the Legislature, *see Calder v. Bull*, 3 Dall. [U.S.] 386, 1 L.Ed. 648 (1798), and does not of its own force apply to the Judicial Branch of government." *Marks v. United States*, 430 U.S. 188, 191, 97 S.Ct. 990, 992, 51 L.Ed.2d 260 (1977).

It is the Due Process Clause, rather than the Ex Post Facto Clause, which protects criminal defendants against novel developments in judicial doctrine. *See, e.g., Bouie v. Columbia*, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964). *See also United States v. Ruiz*, 935 F.2d 1033, 1035 (9th Cir.1991). However, an unforeseeable judicial construction of a statute may run afoul of the Due Process Clause because of the same policy underlying the Ex Post Facto Clause-lack of "fair warning of that conduct which will give rise to criminal penalties." *Marks*, 430 U.S. at 191, 97 S.Ct. at 992-93.

The Arizona statutory scheme was clear in 1982. The felony murder statute provided that robbery or attempted robbery were predicate felonies, and that the statute applied if, "in the course of and in furtherance of such offense or immediate flight from such offense, [the defendant] causes the death of any person." A.R.S. § 13-1105(A)(2). The capital punishment statute provided that defendant's expectation of the receipt of something of pecuniary value was an aggravating factor. A.R.S. § 13-703(F)(5). So, unless the Arizona Supreme Court had narrowed the clear terms of the statutes to a robber's benefit prior to the LaGrands' commission of the murder, there was no due process violation.

The cases cited by the LaGrands do not support the result they seek. Two of them, *State v. Jordan*, 126 Ariz. 283, 614 P.2d 825 (*in banc*), *cert. denied*, 449 U.S. 986, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980), and *State v. Jeffers*, 135 Ariz. 404, 661 P.2d 1105 (*in banc*), *cert. denied*, 464 U.S. 865, 104 S.Ct. 199, 78 L.Ed.2d 174 (1983), did not involve reliance on the pecuniary gain factor.

Nor do the other cases cited support their argument. *State v. Correll*, 148 Ariz. 468, 479, 715 P.2d 721, 732 (1986) (*in banc*), involved murders committed in order to insure that no one be left to identify the robbers ("The only motivation for the killings was to leave no witnesses to the robbery."). *State v. Hensley,* 142 Ariz. 598, 604, 691 P.2d 689, 695 (1984) (*in banc*), was much the same ("In this case, the murders were a part of the overall scheme of the robbery with the specific purpose to facilitate the robbers' escape."). There is language in *Hensley* from an earlier case indicating that "an unexpected or accidental death that was not in furtherance of the defendant's goal of pecuniary gain" would not support a finding of the aggravating circumstance. *Id.* 142 Ariz. at 603, 691 P.2d at 694 (quoting *State v. Harding,* 137 Ariz. 278, 296, 670 P.2d 383, 401 (1983) (Gordon, J., concurring), *cert. denied,* 465 U.S. 1013, 104 S.Ct. 1017, 79 L.Ed.2d 246 (1984)).[2]

The LaGrands' argument seems to be premised on their claim that the killing was not in furtherance of the robbery, but rather came about when Ken Hartsock kicked Karl during a struggle, and Karl impulsively reacted by stabbing him. However, this argument is contrary to Dawn Lopez's testimony that she saw both men involved in a struggle with Ken Hartsock and her testimony that she twice heard at least one of them say "make sure he's dead." Ms. Lopez's evidence is consistent with a murder committed in order to eliminate witnesses. The LaGrands' argument is also contrary to the *Enmund*[3] finding of the district court: "The court finds beyond a reasonable doubt that both defendants participated in the actual killing of Mr. Hartsock and that both defendants intended to kill him."

The Arizona Supreme Court's decisions in the *LaGrand* cases were not an unforeseeable departure from its existing jurisprudence, and no due process violation occurred. *Poland v. Stewart,* 117 F.3d 1094, 1098–1100 (9th Cir.1997).

B. *Consular Notification*

The LaGrands contend that, as German nationals, they were entitled to contact the German consulate upon being arrested and that the Arizona authorities' failure to inform them of this right violated their constitutional rights. The *Vienna Convention on Consular Relations of 1963,* Article 36, TIAS 6820, 21 U.S.T. 77,596 UNTS 261 (Ratified by United States Senate on December 24, 1969) ("The Treaty"), requires the receiving state (here, the United States) to allow nationals of the sending state (here, Germany) to notify their national consulate after they are arrested. The authorities of the receiving state are required to inform the arrested foreign national "without delay of his rights under this sub-paragraph." *Id.*

It is undisputed that the State of Arizona did not notify the LaGrands of their rights under the Treaty. It is also undisputed that this claim was not raised in any state proceeding. The claim is thus procedurally defaulted.

[3, 4] We may address the merits of a procedurally defaulted claim if the petitioner can show cause for the procedural default and actual prejudice as a result of the alleged violations of federal law. *Bonin v. Calderon,* 77 F.3d 1155, 1158 (9th Cir.), *cert. denied,* 516 U.S. 1143, 116 S.Ct. 980, 133 L.Ed.2d 899 (1996). To demonstrate cause, the petitioner must show the existence of "some objective factor external to the defense [which] impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier,* 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986); *see also McCleskey v. Zant,* 499 U.S. 467, 497, 111 S.Ct. 1454, 1471–72, 113 L.Ed.2d 517, *reh'g denied,* 501 U.S. 1224, 111 S.Ct. 2841, 115 L.Ed.2d 1010 (1991) (cause is external impediment such as government interference or reasonable unavailability of claim's factual basis). Lacking cause and prejudice, we may nonetheless consider procedurally barred claims if failure to do so would result in the conviction or execution of " 'one who is actually innocent.' " *Schlup v. Delo,* 513 U.S. 298, 321, 115 S.Ct. 851, 864, 130 L.Ed.2d 808 (1995).

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[2] The LaGrands base most of their arguments here on cases decided *after* the crime was committed. Those cases would obviously not support their argument that the LaGrands lacked notice of the extent of the statute's reach at the time of the crime.

[3] *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

[5] As to cause, the LaGrands argue ineffective assistance of counsel. In Karl's case, he was represented by one lawyer at trial, a second lawyer on appeal, a third lawyer in his state post-conviction relief (PCR) proceeding and present counsel on his federal habeas. Karl has offered no support for his argument that something external to the defense prevented his lawyer from presenting this claim to the state courts, except ineffective assistance of *trial* counsel. He has not, however, argued, let alone shown, that any external factor prevented his counsel in the state PCR proceeding from presenting this claim. He has therefore not shown cause.

Walter, who has had the same lawyer throughout, signed a waiver of his right to present ineffective assistance of counsel claims. We will discuss this waiver in more detail when we reach Walter's individual claims. The waiver is sufficient to preclude using his lawyer's ineffective assistance as cause for failing to present this claim to the state courts. Thus, the LaGrands have failed to demonstrate cause for their procedural defaults in state court.

The LaGrands argue that they meet the fundamental miscarriage of justice standard since they are actually innocent of the death penalty. Their basic argument is that the failure to notify them of their right to contact the German consulate "effectively blocked LaGrands' ability to gather exculpatory or mitigating evidence." The Supreme Court has stated, however, that actual innocence of the death penalty must focus on eligibility for the death penalty, and not on additional mitigation. *Sawyer v. Whitley*, 505 U.S. 333, 345–46, 112 S.Ct. 2514, 2523, 120 L.Ed.2d 269 (1992).

The evidence the LaGrands contend they were blocked from obtaining relates to background information concerning their abusive childhoods in Germany and the difficulties that children of mixed marriages encountered in Germany. While this evidence could have related to mitigation, it has no demonstrable connection to the findings of pecuniary gain or that the murder was committed in an especially cruel, heinous or depraved manner. Because the postulated evidence does not go to eligibility for the death penalty, the LaGrands do not substantiate their claim of actual innocence.

C. *The Constitutionality of Arizona's Felony Murder Statute*

[6] The LaGrands requested a second-degree murder instruction as a lesser-included offense to the felony murder charge. The trial court denied the request as Arizona felony murder law does not include any lesser-included offenses. *State v. LaGrand*, 153 Ariz. at 30–31, 734 P.2d at 572–73. The LaGrands challenge the court's refusal to give the lesser-included instruction on the basis that the ruling was contrary to the teaching of *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), and thus violated the Constitution.

In *Beck*, the Supreme Court considered a unique Alabama statute under which the jury was given only a choice of conviction of capital murder or acquittal. The Supreme Court reversed Beck's conviction on the basis that the limited choices available to the jury impermissibly enhanced "the risk of an unwarranted conviction." *Id.* at 637, 100 S.Ct. at 2389. "The goal of the *Beck* rule ... is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." *Schad v. Arizona*, 501 U.S. 624, 646–47, 111 S.Ct. 2491, 2505, 115 L.Ed.2d 555 (1991).

In the instant case, however, the all-or-nothing scenario condemned in *Beck* did not exist. As to the charge of murder in count one, the jury was told it could return verdicts of guilty of murder in the first degree, murder in the second degree or not guilty. The LaGrands were charged with first-degree murder. The jury was told that the crime could be committed as a felony murder or as premeditated murder. An instruction on second-degree murder was given, as was a possible verdict of second-degree murder as to Count One. The jury was not specifically told that second-degree murder was not a lesser-included offense to felony murder, although a close reading of the instructions could have led the jury to that conclusion.

The jury was also given the choice of convicting or acquitting the defendants of attempted first-degree murder, attempted second-degree murder, aggravated assault, armed robbery, robbery and kidnapping in the other counts. In the event the jury had found itself unable to agree on a conviction of first-degree murder, it would not have had to face the choice of simply acquitting the LaGrands.

Thus, the instructions in the instant case do not implicate the concerns of the *Beck* doctrine because the LaGrands' jury was not faced with the "all or nothing" choice presented in *Beck*. *See Schad*, 501 U.S. at 646–47, 111 S.Ct. at 2505 (no *Beck* error where instruction does not present jury with "all-or-nothing choice between the offense of conviction (capital murder) and innocence") (quotations omitted).

D. *Inadequate Weighing by the State Courts*

The LaGrands argue that the state courts did not adequately consider the mitigation evidence presented at the sentencing. They rely on the panel opinion in *Jeffers v. Lewis*, 974 F.2d 1075, 1079 (9th Cir.1992): "[when] there is a risk that mitigating evidence in [a] case was not *fully* considered, [Petitioner's] sentence of death cannot stand."

However, this court took the *Jeffers* case *en banc*, and affirmed the district court's denial of the petition. *Jeffers v. Lewis*, 38 F.3d 411 (9th Cir.1994), *cert. denied*, 514 U.S. 1071, 115 S.Ct. 1709, 131 L.Ed.2d 570 (1995). There we said, quoting *Jeffries v. Blodgett*, 5 F.3d 1180, 1197 (9th Cir.1993), *cert. denied*, 510 U.S. 1191, 114 S.Ct. 1294, 127 L.Ed.2d 647 (1994): "[D]ue process does not require that the sentencer exhaustively document its analysis of each mitigating factor as long as a reviewing federal court can discern from the record that the state court did indeed consider all mitigating evidence offered by the defendant." *Jeffers*, 38 F.3d at 418.

[7] The LaGrands do not argue that the state courts refused to consider any of their proffered mitigating evidence. They argue that the mitigating circumstances were not considered "fully." However, the federal courts do not review the imposition of the sentence *de novo*. Here, as in the state courts' finding of the existence of an aggravating factor, we must use the rational fact-finder test of *Lewis v. Jeffers*. That is, considering the aggravating and mitigating circumstances, could a rational fact-finder have imposed the death penalty? The answer is "yes."

[8] The aggravating circumstances of pecuniary gain, a murder committed in an especially heinous, cruel or depraved manner and prior conviction of a felony involving the use or threat of violence were well supported in the record. While there were mitigating factors, such as the LaGrands' ages (Walter was 19; Karl, 18), their prior home life and their remorse, a rational sentencer could have nevertheless imposed the death penalty.

E. *District Court's Upholding of Death Penalty*

The LaGrands argue that the death penalty should not have been upheld by the district court. They point out that the Supreme Court has said that "the death penalty can be upheld in only the most egregious cases," citing *Godfrey v. Georgia*, 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398 (1980), and that the death penalty "is reserved for truly exceptional cases," citing *State v. Bible*, 175 Ariz. 549, 606, 858 P.2d 1152, 1209 (1993). They argue that this case does not come within the "truly exceptional" category.

[9] The LaGrands in effect ask us to review the Arizona Supreme Court's determination that the imposition of the death penalty in their case was not disproportionate to the penalty imposed in similar cases. *See State v. Walter LaGrand*, 153 Ariz. at 37, 734 P.2d at 579; *State v. Karl LaGrand*, 152 Ariz. at 488–90, 733 P.2d at 1072–73. However, once the Arizona Supreme Court "undertook its proportionality review in good faith and found that [the LaGrands'] sentence was proportional to the sentences imposed" in similar cases, "[t]he Constitution does not require [the federal habeas court] to look behind that conclusion." *Lewis v. Jeffers*, 497 U.S. 764, 779, 110 S.Ct. 3092, 3101, 111 L.Ed.2d 606 (1990) (quoting *Walton v. Arizona*, 497 U.S. 639, 655–56, 110 S.Ct. 3047, 3058, 111 L.Ed.2d 511 (1990)). There is no indication that the Arizona Supreme Court's proportionality review was conducted in bad faith. The LaGrands' proportionality claim therefore fails.

[10] The LaGrands also contend that the state courts and the federal district court improperly "assumed" the existence of the aggravating factor of "cruel, heinous or depraved," rather than finding its existence beyond a reasonable doubt. However, the state courts did indeed premise their finding of "cruel, heinous or depraved" upon specific evidence of Hartsock's physical and mental suffering, the LaGrands' infliction of gratuitous violence upon and mutilation of Hartsock, and Hartsock's position of helplessness. *See State v. Walter LaGrand*, 153 Ariz. at 36-37, 734 P.2d at 578-79. The state trial court found that this aggravating circumstance had been established beyond a reasonable doubt. *See id.* at 34, 734 P.2d at 576. Accordingly, this claim also fails.

F. *Lethal Gas as a Method of Execution*

[11] In Arizona, all condemned prisoners will be executed by means of lethal injection unless those who were sentenced before the Arizona legislature adopted lethal injection affirmatively choose lethal gas as the method to be used in their cases. A.R.S. § 13-704(B). The LaGrands come within the group having this option under state law. Thus, they would be executed by lethal gas only if they affirmatively choose to do so.

The court held in *Poland v. Stewart*, 117 F.3d 1094, 1104 (9th Cir.1997), that Poland's claim that lethal gas was an unconstitutional method of execution was not ripe. For the same reasons, the LaGrands' claim is not ripe and cannot be considered. *Id.*

G. *Lethal Injection as a Method of Execution*

[12] The LaGrands also contend that lethal injection is an unconstitutional method of execution.[4] In support of this claim, they submitted the reports of eyewitnesses to two Arizona executions using lethal injection. One report, published in the *Arizona Republic* on March 3, 1993, said that John George Brewer "was pronounced dead at 12:18 a.m., one minute after he received a combination of three drugs injected through a pair of intravenous tubes."

A report of the execution of James Dean Clark was published in the same paper on April 15, 1993, but with a different by-line. The report said:

> Then as three lethal drugs surged into his veins at 12:05 a.m., Clark's chest heaved several times, and his skin turned ashen.... Because it didn't look like he simply was going to sleep, Clark's execution was much more gruesome, intense, bizarre and dramatic than I had anticipated. But it was also much easier to watch than I expected, because Clark didn't appear to suffer nearly as much as Don Eugene Harding, who died in the gas chamber last April.

The LaGrands also submitted an affidavit from an observer of the lethal *gas* execution of Don Harding:

> Don Harding took ten minutes and thirty-one seconds to die. At least eight of those minutes were spent in gross and brutal agony.... Then I will never forget the look on his face when he turned to me several seconds after first having inhaled the fumes. It is an image of atrocity that will haunt me for the rest of my life. Don Harding's death was slow, painful, degrading and inhumane.... He literally choked and convulsed to death in front of my eyes.

In addition to the reports mentioned above, the LaGrands submitted the affidavit of one Michael L. Radelet, prepared for a separate capital case in Arizona. Radelet, a sociologist who collected reports of "botched" executions, described what happened in nine executions by lethal injection. They involved either problems in finding a suitable vein or violent reactions to the drugs. None took place in Arizona and none were tied to the protocol used in Arizona.

The LaGrands also submitted the affidavit of a doctor on the staff of the College of Medicine at the University of Arizona who reviewed the procedures established for the administration of lethal injection in Arizona. Apparently he did not witness either of the two executions in Arizona by lethal injection. His ultimate conclusion was that the procedures were flawed, but his affidavit is replete with speculation. For example, he states at some length the possible consequences of administering the designated drugs in the wrong sequence. While he states that there may be some risk of this, the two Arizona executions recounted in the other materials show no such problems in actual practice. *See Campbell v. Wood*, 18 F.3d 662, 668 (9th Cir.) ("The risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review."), *cert. denied*, 511 U.S. 1119, 114 S.Ct. 2125, 128 L.Ed.2d 682 (1994).

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[4] For purposes of this opinion, we will assume that such a challenge is properly brought in a Section 2254 action. While the claim is procedurally barred by failure to raise it in state court, we will examine the merits of the claim to determine if the LaGrands could meet the prejudice prong of the cause and prejudice standard of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

The LaGrands' challenge is similar to that rejected in *Poland*, 117 F.3d at 1104-05, and the district court did not err in rejecting their challenge to Arizona's use of lethal injection as a method of execution.

III

WALTER'S INDIVIDUAL CLAIMS

A. *The Exclusion of Karl's Confession*

[13] Karl made two separate recorded statements in the late hours of January 7 and early hours of January 8. In those statements he assumed sole responsibility for the attack on Ken Hartsock, saying it occurred after Mr. Hartsock kicked him in the leg. He said that Walter did not stab anyone and that Walter was not in the room when he stabbed Mr. Hartsock and Ms. Lopez.

Pursuant to the stipulation of the parties, the trial court ruled that the confessions were voluntary but that they were taken in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). This precluded the State from introducing the confessions as evidence in the guilt phase of the trial against Karl. The *Miranda* stipulation did not, however, preclude Walter from introducing the confessions as part of his defense. Walter thus sought to have the confessions introduced under Arizona Rule of Evidence 804(b)(3), which is identical to Federal Rule of Evidence 804(b)(3). The rule provides as follows:

> Rule 804. Hearsay Exceptions; Declarant Unavailable
>
> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> (b)(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability ... that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

153 Ariz. at 26–27, 734 P.2d at 568–69 (quoting A.R.S. Rule of Evid. 804(b)(3)). After considering Walter's request on four separate occasions, the trial court held the confessions were inadmissible at the guilt phase of the trial.

[14] On appeal from the LaGrands' convictions, the Arizona Supreme Court explained the proper method of determining admissibility under Rule 804(b)(3):

> We therefore hold that a judge's inquiry, made to assure himself that the corroboration requirement of Rule 804(b)(3) has been satisfied, should be limited to asking whether evidence in the record corroborating and contradicting the declarant's statement would permit a reasonable person to believe that the statement could be true. If a judge believes that a reasonable person could [so] conclude ... then the judge must admit the statement into evidence.

State v. Walter LaGrand, 153 Ariz. at 36, 734 P.2d at 570.

Applying this standard, the Arizona Supreme Court concluded that the trial court's refusal to admit the statements was not in error:

> Evidence both corroborating and contradicting Karl's statements exists. The following evidence corroborated Karl's statements: Karl did have a bruise on his leg as he stated; Lopez testified that she saw Hartsock kick someone; Lopez testified that only one person stabbed her; and

> Walter testified that he was out of the room when the stabbings occurred. The following evidence contradicted Karl's statements: Lopez testified that she saw Hartsock struggling with two men; Lopez testified that she was "positive" that Walter had stabbed her; Lopez testified that after being stabbed by Walter and falling to the floor one brother said to the other twice, "Just make sure he's dead"; and the forensic consultant who performed an autopsy on Hartsock testified that more than one instrument was used to inflict Hartsock's wounds.
>
> After reviewing the above corroborating and contradicting evidence, we do not think that a reasonable person could conclude from the same corroborating and contradictory evidence that Karl's exculpatory statements could be true. The trial judge properly denied admission of Karl's statements.

Id. 153 Ariz. at 29, 734 P.2d at 571.

Walter's argument here is that exclusion of the confessions violated his Sixth Amendment right to "present a complete defense" to the charges against him. *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984). He relies on "the *Chambers* doctrine" derived from *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

Chambers was convicted of killing a policeman in a small town in Mississippi. Gable McDonald had confessed to killing the officer in a statement to Chambers' lawyer, but he later repudiated the confession.

At trial, Chambers attempted to show he did not shoot the officer. He also tried to show that McDonald was the shooter. The trial court would not permit Chambers to introduce the testimony of three witnesses to whom McDonald had admitted shooting the officer on the grounds that the proffered testimony was hearsay. Mississippi recognized statements against pecuniary interest, but not statements against penal interest, as an exception to the hearsay rule.

The Court reversed Chambers' conviction, saying:

> The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

Chambers, 410 U.S. at 302, 93 S.Ct. at 1049.

Chambers is but one of several Supreme Court decisions dealing with state rules of evidence used to reject a defendant's evidence on "mechanistic" grounds. In *Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979), the Court again reversed a conviction where the Georgia courts had rejected hearsay statements on the ground that Georgia did not recognize the penal interest exception to the hearsay rule.

An earlier case, *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), involved Texas statutes which prohibited persons charged or convicted as co-participants in a crime from testifying for each other, though they could testify for the State. Washington's proffer of testimony tended to show that Washington was not the shooter. The evidence was rejected pursuant to the Texas statutes. The Supreme Court reversed the conviction on the grounds that the State's rule "arbitrarily" deprived Washington of his right under the Sixth Amendment to present witnesses in his defense.

In the more recent case of *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987), the Court held that a state could not "arbitrarily or disproportionately" prevent a defendant from testifying in her defense by implementing a *per se* rule prohibiting hypnotically enhanced testimony.

These cases, taken together, stand for the proposition that states may not impede a defendant's right to put on a defense by imposing mechanistic (*Chambers*) or arbitrary (*Washington* and *Rock*) rules of evidence. But they do not stand for the proposition that a defendant must be allowed to put on any evidence he chooses. As the Court said in *Chambers*:

> Few rights are more fundamental than that of an accused to present witnesses in

> his own defense. In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.

410 U.S. at 302, 93 S.Ct. at 1049 (citations omitted). *See also Crane v. Kentucky,* 476 U.S. 683, 690, 106 S.Ct. 2142, 2146, 90 L.Ed.2d 636 (1986) ("[W]e have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability-even if the defendant would prefer to see the evidence admitted.").[5]

Here, Karl LaGrand's confession was not excluded as a result of rigid application of arbitrary or mechanistic rules of admissibility. Rather, the state courts determined, after analyzing the proffer and the corroborating and contradictory circumstances, that the confession was not sufficiently reliable to warrant its introduction. Thus, the refusal to admit Karl's confession did not run afoul of the *Chambers–Washington–Rock* prohibition against arbitrary and mechanistic exclusion of exculpatory evidence.

While *Chambers* clearly prohibits states from excluding exculpatory evidence by application of rigid or arbitrary exclusionary rules, it is not clear whether the *Chambers* doctrine implies a requirement of independent federal review of a state court's determination of reliability. In *Lee v. McCaughtry,* 933 F.2d 536, 538 (7th Cir.), *cert. denied,* 502 U.S. 895, 112 S.Ct. 265, 116 L.Ed.2d 218 (1991), the Seventh Circuit suggested that *Chambers* imposed no such requirement: "Once a state has brought its rules of evidence into line with constitutional norms, there is little point in case-by-case federal review of evidentiary rulings." However, the *Lee* court specifically declined to answer the question whether federal review is required, and instead duplicated the state court's reliability inquiry and concluded that the refusal to admit the evidence was proper. *Id. See also Turpin v. Kassulke,* 26 F.3d 1392, 1397 (6th Cir.1994) (reversing district court's granting of habeas petition after reviewing the testimony excluded by the state trial court and concluding that the evidence was indeed "fundamentally untrustworthy"), *cert. denied,* 513 U.S. 1118, 115 S.Ct. 916, 130 L.Ed.2d 797 (1995).

We need not answer the question here because, even assuming that federal review is required, the Arizona Supreme Court's conclusion-that Karl's statement exculpating Walter was not sufficiently reliable to come in under Rule 804(b)(3)–finds ample support in the record and thus cannot be said to have had "substantial and injurious effect or influence in determining the jury's verdict" against Walter LaGrand. *Brecht v. Abrahamson,* 507 U.S. 619, 623, 113 S.Ct. 1710, 1716, 123 L.Ed.2d 353 (1993) (quoting *Kotteakos v. United States,* 328 U.S. 750, 776, 66 S.Ct. 1239, 1253, 90 L.Ed. 1557 (1946)).[6]

[15] Karl LaGrand's confession included two separate statements: first, that he, Karl LaGrand, stabbed Ken Hartsock, and second, that Walter LaGrand did not stab anyone. Because the "statements against penal interest" exception to the hearsay rule is premised upon the inherent reliability of statements that tend to incriminate the declarant, federal courts have concluded that a statement that includes both incriminating declarations and corollary declarations that, taken alone, are not inculpatory of the declarant, must be separated and only that portion that is actually incriminating of the declarant ad-

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[5] *See also* the discussion in *Montana v. Egelhoff,* 518 U.S. 37, ——— ——, 116 S.Ct. 2013, 2021–22, 135 L.Ed.2d 361 (1996) (plurality opinion).

[6] Much of the analysis here relies upon cases in which federal appeals courts were directly reviewing the evidentiary rulings of federal trial courts, rather than collaterally reviewing state court rulings in the context of federal habeas proceedings. The court is mindful of the distinction between direct and collateral review, including the fact that direct review involves application of the abuse of discretion standard, while collateral review falls under the "substantial and injurious effect" standard announced in *Brecht.* However, the rules and considerations that guide federal appeals courts on direct review of federal trial court rulings are nonetheless instructive, and in any event, the "abuse of discretion" standard of review is less deferential than the standard applied to state court rulings in habeas cases. *See, e.g., Engle v. Isaac,* 456 U.S. 107, 134–35, 102 S.Ct. 1558, 1575, 71 L.Ed.2d 783 (1982) ("[T]he burden of justifying federal habeas relief for state prisoners is greater than the showing required to establish plain error on direct appeal.") (internal quotations omitted).

mitted under the exception. *See Williamson v. United States*, 512 U.S. 594, 599–600, 114 S.Ct. 2431, 2434–35, 129 L.Ed.2d 476 (1994) (noting that judges in federal cases must separate the incriminatory portions of statements from other portions for purposes of Rule 804(b)(3) because "[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts"); *Carson v. Peters*, 42 F.3d 384, 386 (7th Cir. 1994) ("Portions of inculpatory statements that pose no risk to the declarants are not particularly reliable; they are just garden variety hearsay."); *United States v. Porter*, 881 F.2d 878, 882–83 (10th Cir.) (if a statement exculpatory to the accused is severable from the statement inculpatory to the declarant, each statement must be separately analyzed under Rule 804(b)(3)), *cert. denied*, 493 U.S. 944, 110 S.Ct. 348, 107 L.Ed.2d 336 (1989); *United States v. Lilley*, 581 F.2d 182, 188 (8th Cir.1978) ("To the extent that a statement is not against the declarant's interest, the guaranty of trustworthiness does not exist and that portion of the statement should be excluded.").

In stating that Walter did not stab anyone, Karl was not further incriminating himself. The reliability that attends the inculpatory part of his confession does not afford any reliability to that part of the statement that merely exculpates Walter. Accordingly, it was not entitled to the benefit of Rule 804(b)(3)'s exception to the hearsay rule.

Further, as noted by the Arizona Supreme Court, direct evidence contradicted Karl's statement that Walter was not involved in the stabbing of Ken Hartsock: Mr. Hartsock was stabbed 24 times and all wounds were frontal; the wounds were consistent with two different instruments having been used; Ms. Lopez, the only eyewitness, testified that Walter was standing in front of Mr. Hartsock while Karl held him from behind; that at least one person said twice, "Make sure he's dead"; and that Walter stabbed her.

[16] Finally, under federal case law, a judge ruling on the reliability of Karl's statement could consider that Walter's own testimony was not corroborative, *see Turpin*, 26 F.3d at 1397–98, and that the exculpatory statements of family members are not considered to be highly reliable, *United States v. Bobo*, 994 F.2d 524, 528 (8th Cir.), *cert. denied*, 510 U.S. 891, 114 S.Ct. 250, 126 L.Ed.2d 203 (1993).

In light of the foregoing, we conclude that even if *Chambers* requires federal review of the state courts' determination of reliability, the Arizona courts' conclusion that the statement was not sufficiently reliable to be admitted was both "reasoned and reasonable" and, as such, did not violate Walter LaGrand's right to present a complete defense. *Carson*, 42 F.3d at 387.

[17] Walter also argues that the standard of "clearly" indicating a statement's trustworthiness is "too onerous a burden." He argues that *Chambers* stands for the proposition that the courts can require only a "more reasonable, minimal [burden]." He relies mainly on texts and law review articles,[7] being unable to point to cases which specifically hold that Rule 804(b)(3), in either state or federal garb, runs afoul of a defendant's due process rights for that reason. This argument fails because, given the inherent unreliability of corollary exculpatory statements, Rule 804(b)(3)'s requirement that such statements be clearly corroborated is entirely legitimate and reasonable.

Walter also makes a related argument concerning the discriminatory effects of the corroboration requirement of Rule 804(b)(3). This argument springs from the Supreme Court's statement in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), that the Confrontation Clause does not bar introduction of hearsay testimony which bears sufficient indicia of reliability. The Court said that reliability can be inferred without further corroboration in cases where the evidence falls within a "firmly rooted hearsay exception." *Id.* at 66, 100 S.Ct. at 2539. Otherwise, a "showing of particularized guarantees of trustworthiness [would] be required." *Id.*

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[7] *Weinstein's Evidence*, ¶ 804(b)(3)[03]. Peter W. Tague, *Perils of the Rule-making Process: The Development, Application and Unconstitutionality of Rule 804(b)(3)'s Penal Interest Exception*, 69 Geo.L.J. 851 (1981). Edward J. Imwinkelried, *The Constitutionalization of Hearsay: The Extent to Which the Fifth and Sixth Amendments Permit or Require the Liberalization of the Hearsay Rules*, 76 Minn.L.Rev. 521 (1992).

Since the state can introduce a confession without showing clear corroboration, the argument goes, the defendant should be able to do the same. This argument suffers from the same flaw as the preceding one: exculpatory statements such as Karl's do not come within a "firmly rooted hearsay exception" as do incriminating statements. *See Carson v. Peters*, 42 F.3d at 386. In limiting admissible evidence to that found to be reliable, the rule-writers may legitimately impose the burden of offering proof of clearly corroborating circumstances on those offering exculpatory hearsay statements.

Walter also argues that the state courts' rejection of Karl's confessions unconstitutionally interfered with the jury's fact-finding role. The state's contention that this claim was not raised in the district court or in state court has merit. In the district court, the argument that the trial court's ruling invaded the province of the jury was simply a subset of the contention that *Chambers* required the trial court to admit the evidence. There was not, as there is here, a stand-alone argument of interference with the jury's function. A decision on this issue is subsumed in the ruling on the "*Chambers* doctrine" and need not be separately addressed.

We conclude that there was no constitutional error in the Arizona courts' decision to exclude under Rule 804(b)(3) Karl LaGrand's statement that Walter was not involved in the stabbing of Ken Hartsock.

B. *Mr. Burke's Request to Withdraw*

[18] Walter LaGrand has been represented by Bruce Burke, a Tucson lawyer, throughout all proceedings to date. Prior to appointing him as counsel in Walter's federal habeas proceeding, the district court required Mr. Burke to discuss possible claims of ineffective assistance of counsel with Walter and then to file a status report with the court.

In the status report, Mr. Burke recounted a meeting he had had with Walter in which he had explained the issue of ineffective assistance of counsel, "and [had told him] that such a claim might provide him with an avenue for relief from the death penalty." Mr. Burke also informed Walter that he knew of no instances in which his own assistance had been ineffective. He further told Walter that the court "would appoint an additional attorney, or a new attorney, to examine my performance" if Walter desired. Walter told Mr. Burke that "he did not want me to take steps which might require me to withdraw as his attorney of record and he did not wish me to seek appointment of a new attorney to consider the issue."

After Mr. Burke was appointed in federal court, he learned that Karl's counsel was going to present evidence to the effect that his trial counsel had been ineffective at the sentencing phase of the case. Because Mr. Burke believed that this drew into question his own effectiveness at sentencing, he moved to withdraw as Walter's counsel.

The district court denied the motion on the grounds that Walter had been given an opportunity to change counsel in order to present an ineffective assistance of counsel claim but had waived that right. The court also held that no prejudice had been shown since the claimed failure did not constitute ineffective assistance of counsel.

We review the district court's order for abuse of discretion. *United States v. Baker*, 10 F.3d 1374 (9th Cir.1993), *cert. denied*, 513 U.S. 934, 115 S.Ct. 330, 130 L.Ed.2d 289 (1994). Walter's waiver was not of specific instances of ineffectiveness, but of the employment of new counsel to potentially pursue such claims.

In this instance, Walter's claim that the waiver was not effective because he didn't know the facts constituting the claim has no merit. When Walter waived the offer of new counsel, he was waiving the benefits of new representation, among which would potentially have been the presentation of this sort of new claim. *See United States v. Lowry*, 971 F.2d 55 (7th Cir.1992). Since the claim now asserted was well within the waiver, the district court did not abuse its discretion in denying the motion.

For the foregoing reasons, we affirm the district court's denial of Walter's petition.

IV

KARL'S INDIVIDUAL CLAIMS

A. *Ineffective Assistance of Counsel*

[19] A claim of ineffective assistance of counsel presents a mixed question of law and

fact which we review *de novo*. *Sanders v. Ratelle*, 21 F.3d 1446, 1451 (9th Cir.1994) (citing *Strickland v. Washington*, 466 U.S. 668, 698, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984)).

Under *Strickland*, a petitioner seeking habeas relief based on the ineffective assistance of counsel must show: (1) that the counsel's performance falls "below an objective standard of reasonableness," 466 U.S. at 688, 104 S.Ct. at 2064; and (2) that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different, *id.* at 694, 104 S.Ct. at 2068.

Karl claims that the district court erred on his *Strickland* ineffectiveness claim: (1) by limiting the scope of the evidentiary hearing; and (2) by finding that Karl's trial counsel's performance did not fall below an objective standard of reasonableness.

1. *Scope of Evidentiary Hearing*

[20, 21] In a capital case, a petitioner is entitled to an evidentiary hearing where there has been no state court evidentiary hearing and the petitioner raises a "colorable" claim of ineffective assistance. *Smith v. McCormick*, 914 F.2d 1153, 1170 (9th Cir. 1990). The scope of an evidentiary hearing on a motion under 28 U.S.C. § 2254 is committed to the discretion of the district court. *United States v. Layton*, 855 F.2d 1388, 1421 (9th Cir.1988), *cert. denied*, 489 U.S. 1046, 109 S.Ct. 1178, 103 L.Ed.2d 244 (1989).

In the present case, the district court held an evidentiary hearing on Karl's ineffective assistance of counsel claim for the limited purpose of determining whether Karl could establish the first prong of the *Strickland* test. Karl was therefore required to prove that his counsel's performance was deficient before the court would entertain evidence regarding prejudice.

[22] Karl argues that the district court's limitation on the scope of the evidentiary hearing was erroneous for two reasons. *First*, Karl claims that the two prongs of the *Strickland* test are interconnected and that they must be considered together.

No court has ever held that both prongs of the *Strickland* test must be examined simultaneously. To the contrary, the Supreme Court has held that a court is not required to address both components of the *Strickland* test in deciding an ineffective assistance of counsel claim "if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069. Thus, a court need not determine whether defendant was prejudiced by counsel's alleged deficiencies if it determines that counsel's performance was not deficient. *See id.*; *Cacoperdo v. Demosthenes*, 37 F.3d 504, 508 (9th Cir. 1994) (defendant failed to show lack of thorough investigation of law and facts and therefore failed to meet his burden on the first prong of the *Strickland* test), *cert. denied*, 514 U.S. 1026, 115 S.Ct. 1378, 131 L.Ed.2d 232 (1995).

[23] *Second*, Karl claims that the district court erred in not allowing him to present expert medical and legal testimony regarding his trial counsel's performance. Karl alleges that he needed to present expert testimony to show what evidence could and should have been presented by his trial counsel. This claim lacks merit.

The district court allowed Karl to present the testimony of five attorneys regarding the standard of care used by Karl's attorney. These attorneys were all familiar with the case. Karl has failed to cite any authority, and we have found none, that supports his contention that only outside expert testimony can provide a basis on which to measure counsel's performance.

Furthermore, the majority of the proffered expert testimony rejected by the court went to the second prong of the *Strickland* test, which was not the subject of the hearing. Thus, the district court's refusal to allow the expert testimony based on its finding that the testimony would not be relevant to the limited scope of the evidentiary hearing was reasonable.[8] *See Wade v. Calderon*, 29 F.3d

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[8] The district court's finding that expert testimony was an inappropriate method for determining the relevant standard of care against which trial counsel's performance is to be measured was not erroneous. Although the determination of

1312, 1326–27 (9th Cir.1994) (upholding district court's limitation of defendant's expert evidence where the limitation was "reasonably designed to restrict the issue to competence of counsel, on the basis of what was reasonably known by counsel at the time of trial"), *cert. denied*, 513 U.S. 1120, 115 S.Ct. 923, 130 L.Ed.2d 802 (1995).

Because a defendant is required to prove both prongs of the *Strickland* test before relief can be granted, the district court did not abuse its discretion in limiting the scope of the evidentiary hearing to determine whether defendant met the first prong of the *Strickland* test. *See Layton*, 855 F.2d at 1421. Furthermore, the district court's limitation of Karl's expert evidence was reasonably designed to restrict the issue of the hearing to the first prong of the *Strickland* test. Therefore, the district court did not abuse its discretion in refusing the expert medical and legal testimony proffered by Karl. *See Wade*, 29 F.3d at 1326–27.

2. *Performance of Karl's Counsel*

The United States Constitution guarantees that criminal defendants "shall enjoy the right to have the assistance of counsel for [their] defense." U.S. Const. amend VI. This constitutional right to counsel means that all defendants have the right to effective counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 1449 n. 14, 25 L.Ed.2d 763 (1970).

To establish that he was deprived of his right to the effective assistance of counsel, a defendant must show that his counsel's performance falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2064. This inquiry must focus on "whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688, 104 S.Ct. at 2065.

> Prevailing norms of practice ... are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

Id. at 688–89, 104 S.Ct. at 2065.

A reviewing court's scrutiny "of counsel's performance must be highly deferential." *Id.* There is a strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.*

In deciding whether counsel's performance was deficient, we must judge the challenged conduct based on the facts of the particular case, "viewed as of the time of counsel's conduct." *Id.* at 690, 104 S.Ct. at 2066. We must determine whether, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance," keeping in mind that "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.*

In analyzing counsel's performance, "[w]e will neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight." *Campbell v. Wood*, 18 F.3d 662, 673 (9th Cir.), *cert. denied*, 511 U.S. 1119, 114 S.Ct. 2125, 128 L.Ed.2d 682 (1994). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065.

Karl claims that his counsel's performance was deficient in numerous ways. We will discuss each claim of ineffectiveness individually.

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whether counsel has performed deficiently is a mixed question of law and fact, *see Strickland*, 466 U.S. at 698, 104 S.Ct. at 2070, as stated above, there is no requirement that expert testimony of outside attorneys be used to determine the appropriate standard of care.

a. *Impulsivity Defense*

[24] Karl claims that his background and his statements to the police indicate that he murdered Hartsock in a moment of rage after being kicked. He argues that this moment of rage and his "notorious lack of control" showed that he committed this crime on impulse and did not premeditate the crime. Thus, he claims that his attorney acted deficiently by failing to thoroughly investigate or pursue a defense of impulsivity on his behalf. The district court held that Karl's counsel was not ineffective on this issue, *see LaGrand v. Lewis,* 883 F.Supp. 451, 457–58 (D.Ariz.1995), and we agree.

In *State v. Christensen,* 129 Ariz. 32, 35–36, 628 P.2d 580, 583–84 (1981), the Arizona Supreme Court recognized that impulsivity could be a viable defense for premeditated murder because it tends to negate the mental element of premeditation. The defendant in *Christensen* was charged with having committed the premeditated murder of his wife. There was no evidence supporting a claim of felony murder. Therefore, the defendant could be found guilty of first-degree murder only if he was found to have premeditated the murder.

As found by the district court, Karl's counsel was clearly aware of the *Christensen* impulsivity defense. Prior to his representation of Karl, counsel represented a defendant in a case in which the impulsivity defense and *Christensen* were discussed. *See State v. Ramos,* 133 Ariz. 12, 648 P.2d 127 (App. 1981), *vacated,* 133 Ariz. 4, 648 P.2d 119 (1982).

Furthermore, Karl's counsel did not ignore evidence of defendant's impulsivity. Impulsivity evidence was presented during trial through the testimony of Walter and argued by Karl's attorney during closing argument. However, counsel apparently made a decision to not pursue the impulsivity defense more fully.[9]

Such a decision is supported by the record, which reveals the futility of an impulsivity defense. As the district court stated:

> Prior to Ken Hartsock being stabbed, Walter LaGrand had stated that he was going to kill the bank manager if the bank manager was lying about being unable to open the vault. Before Dawn Lopez was permitted to leave the bank to turn off her headlights, she was told that if she did not return, Ken Hartsock would be killed. The bank manager was stabbed twenty four times and Dawn Lopez was stabbed at least seven times. After Ken Hartsock was repeatedly stabbed, either [Karl] or Walter LaGrand was overheard to say: "Just make sure he's dead." Ms. Lopez testified that she heard both [Karl] and Walter LaGrand make such a statement. This evidence belies a claim of impulsivity.

LaGrand, 883 F.Supp. at 458.

Karl's present counsel have spent much time and effort in gathering further evidence and opinion to support the impulsivity defense. However, fleshing it out further makes it no better. Karl's presentation does not overcome the presumption of soundness under *Strickland.* Impulsivity was absolutely no defense to the felony-murder charge, which was the State's principal claim. In fact, premeditated murder remained in the case only because the trial court rejected the State's objection to the defendants' requested instruction on premeditated murder. In addition, pursuit of the impulsivity defense, like the insanity defense, would have necessarily brought Karl's prior record into the case. Counsel's performance was not deficient. *See Strickland,* 466 U.S. at 691, 104 S.Ct. at 2066–67.

b. *Insanity Defense*

[25] Karl claims that his attorney rendered ineffective assistance by failing to pursue an insanity defense. We reject this claim.

Karl's counsel researched the possibility of an insanity defense at length. Karl was examined by two doctors, psychologist Dr. Lewis Hertz and psychiatrist Dr. Edward Meshorer. Neither doctor's reports suggested an insanity defense was available to Karl. Dr. Hertz reported that Karl "knew right from wrong," negating use of the *M'Naughten* test for insanity. Dr. Meshorer's report, while not addressing the *M'Naughten* test, gave no indication that an insanity defense would be a viable option for Karl. As the Arizona Supreme Court pointed out: "[N]o evidence of *M'Naughten* insanity existed." *State v. LaGrand,* 152 Ariz. 483, 485, 733 P.2d 1066, 1068 (1987).

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[9] Trial counsel testified during the evidentiary hearing, but he had reviewed very little of the file, and had little or no recollection of why he did anything during his representation of Karl.

Furthermore, if Karl's counsel had pursued an insanity defense, Arizona procedure would have opened up Karl's juvenile record to inspection and exposed his past to scrutiny. *See State v. Rodriguez,* 126 Ariz. 28, 31, 612 P.2d 484, 487 (1980). As the district court stated:

> Had [Karl's] counsel opened the door to [Karl's] past, the jury would have learned of a lengthy and violent criminal history. [Karl's] presentence reports indicate that less than three months before the events of this case occurred, on two separate occasions [Karl] committed armed robberies and kidnappings at Tucson grocery stores, and had prepared to commit another armed robbery at a third grocery store. When the murder of Ken Hartsock occurred, [Karl] had been released on bail while awaiting trial for armed robbery and kidnapping.
>
> As a juvenile, [Karl] was adjudicated delinquent for multiple burglaries, armed robbery and kidnapping.

LaGrand, 883 F.Supp. at 458.

Because there was a lack of evidence supporting an insanity defense, and because pursuing an insanity defense would have made Karl's lengthy and violent criminal history admissible, counsel's decision not to pursue the insanity defense was reasonable and did not constitute ineffective assistance.

c. *Suppression of Karl's Confession*

[26] After being arrested, Karl made two confessions to the police wherein he admitted committing the murder and stated that it was done in a moment of rage. Karl's previous attorney succeeded in having the confessions suppressed on the grounds that the confessions were involuntary and that Karl had not received his *Miranda* warnings.

After Karl's trial counsel became the lead counsel, he decided that the confessions would be useful at sentencing. The confessions contained statements that made the murder seem less heinous than the eyewitness testimony of Ms. Lopez. If Karl was convicted of first-degree murder, counsel wanted to use the confessions at sentencing in order to mitigate the sentence. Trial counsel sought reversal of the trial court's decision of involuntariness. The trial court agreed, and although the statements were inadmissible at trial due to the lack of a *Miranda* warning, the statements became admissible at sentencing.

Karl claims that his counsel acted ineffectively because counsel changed strategies on whether or not the confessions should be suppressed. We reject this claim.

Previous counsel's decision to seek suppression of the confessions was reasonable. The confessions, while evidencing impulsivity, also contained statements that were highly incriminating because they tended to place the entire blame for Hartsock's death on Karl. Previous counsel believed that Karl was confessing to something that he did not do. Eyewitness testimony contradicted what Karl had confessed to. Thus, previous counsel believed that Karl's confessions would be harmful to the case and therefore made a decision to seek suppression, an effort in which trial counsel participated.

Trial counsel's decision to seek retraction of the trial court's ruling to the extent that the confessions were involuntary was also reasonable. This enabled counsel to exclude the confessions when they would have been the most damaging—during the guilt finding phase—and utilize them at a time when they could prove useful—during sentencing.

However, Karl claims that the use of the confessions at sentencing was only useful to Walter and that trial counsel's decision to have the confessions admissible during sentencing was therefore ineffective. We disagree. The confessions revealed a less egregious crime than that presented by the eyewitness testimony of Ms. Lopez. The sentencing was to be done by the trial judge, who would have already heard Ms. Lopez's testimony. Thus, counsel introduced the confessions at the sentencing phase, with the possibility that Karl's version of the events would offset the testimony of Ms. Lopez. In the absence of the confessions, the sentencer would have no record evidence of Karl's conduct except that of Ms. Lopez. This use of Karl's confessions during sentencing was a sound and reasonable strategic decision by Karl's trial counsel and, as such, does not constitute ineffective assistance.

d. *Interview and Examination of Witnesses*

[27] Karl argues that his counsel acted ineffectively by failing to interview and examine all of the witnesses at trial. We are not persuaded.

Prior to the time that trial counsel was appointed to represent Karl, all of the witnesses had been interviewed. Trial counsel reviewed the transcripts of these interviews. An investigator had also been working on the case prior to trial counsel's appointment, and trial counsel had access to, and reviewed, this investigator's reports. Trial counsel put in the equivalent of twenty-seven eight-hour days in trial preparation. He personally interviewed the only eyewitness, Ms. Lopez. The fact that trial counsel did not personally interview each witness does not constitute ineffective assistance. *See Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir. 1986) (trial counsel does not need to interview a witness if the witness's account is fairly known to counsel).

At trial, Karl's trial counsel was very quiet. Of the eighteen witnesses called by the Government, trial counsel cross-examined only two. One of the witnesses cross-examined by trial counsel was Ms. Lopez.

The Arizona Supreme Court held:

> Although trial counsel here kept an exceedingly low profile, we cannot say that his performance was so deficient as to compromise the adversarial nature of the trial.... Failure to cross-examine most witnesses was not deficient because co-defendant's counsel did an excellent job of cross-examining them. Counsel did cross-examine Dawn Lopez, and establish that Karl was kicked. While we normally expect to see more vigorous representation from counsel, particularly in a death penalty case, we cannot say that counsel's trial performance was ineffective.

LaGrand, 152 Ariz. at 486, 733 P.2d at 1069. We agree.

The trial court's sequence of examination of witnesses resulted in Walter's counsel cross-examining each of the State's witnesses prior to Karl's trial counsel having that opportunity. All parties agree that Walter's counsel did an exceptional job cross-examining the witnesses. Thus, there was not much left to cross-examine when Karl's counsel was allowed to address the witness. If Karl's counsel repeated the questions asked by Walter's counsel, any negative answers would simply have been magnified in the jury's mind. Karl's counsel made a reasonable decision not to add to the questioning of most of the witnesses.

The strategies of respective defense counsel at trial were not nearly as antagonistic as Karl now urges. The evidence against Karl and Walter overlapped. Questions asked by Walter's counsel often inured to the benefit of Karl. In fact, both brothers had the same interests as against each witness except Ms. Lopez. Walter's counsel presented expert testimony regarding flaws associated with eyewitness testimony and extensively cross-examined Ms. Lopez regarding prior inconsistent statements, both of which benefited Karl. In addition, Karl's trial counsel cross-examined Ms. Lopez and attempted to elicit responses from her that would have aided Karl in establishing that his actions were the result of an impulsive reaction rather than premeditation.

Although Karl's trial counsel's performance was not perfect, it was not so unreasonable as to overcome the presumption that, under the circumstances, counsel's conduct was within the wide range of competent professional assistance. Karl's trial counsel's performance was therefore not ineffective. *See Strickland*, 466 U.S. at 687–88, 104 S.Ct. at 2064–65.

e. *Zealous Representation*

Karl claims that the totality of his counsel's representation was not effective, pointing out that counsel did not give an opening statement, only cross-examined two witnesses, and was inexperienced. In this sense, Karl asserts, his attorney acted as a neutral observer rather than a zealous advocate. But trial counsel was not the "potted plant" that Karl now paints him as.

Karl's counsel filed several pretrial motions, which were joined by Walter's counsel, as well as joining in motions filed by Walter's counsel. He persisted in pursuing the psychological test when the first results were inconclusive and finally obtained a usable result when the questions were read to Karl. He examined Ms. Lopez during the hearing on the identification of the defendants, as well as joining in motions filed by Walter's counsel. Trial counsel also questioned well over half of the available prospective jurors during the individual *voir dire*.

[28] Trial counsel's conduct during trial was not so limited as to be ineffective. First, the failure to give an opening statement did not render trial counsel's assistance ineffective. Counsel did not waive opening statement, but rather chose to reserve it and wait until he heard all of the state's evidence before making an opening statement. After the closing of the state's case, counsel chose not to put on any witnesses. Trial counsel thus lost the opportunity to give an opening statement. This was a reasonable strategic decision by counsel and did not constitute ineffective assistance. *See United States v. Rodriguez-Ramirez*, 777 F.2d 454, 458 (9th Cir.1985) (the timing of opening statement, including the decision on whether or not to make one, is a trial tactic and does not constitute a basis for a claim of ineffective assistance).

[29] Karl argues that trial counsel's inexperience rendered his assistance ineffective. In considering a claim of ineffective assistance of counsel, it is not the experience of the attorney that is evaluated, but rather, his performance.

Finally, as stated previously, trial counsel's decision to cross-examine only two of the State's witnesses did not constitute ineffective assistance. Most of the testimony applied to both defendants. The witnesses did not, for the most part, distinguish between Walter and Karl. Cross-examination simply because it was permissible would have served no purpose. The one conspicuous exception was Dawn Lopez, and trial counsel did cross-examine her.

Although Karl's counsel was not very active during the trial, there is nothing to suggest that he was ineffective. Walter's counsel presented numerous arguments that benefitted both parties equally. Karl's counsel made a reasonable decision to "lay low" and allow Walter's arguments to represent them both. There was nothing to be gained by repeating the same arguments advanced by another attorney. Although Karl's counsel chose not to argue every point, his representation did not fall below the reasonably competent performance guaranteed by the Constitution. *See Atkins v. Singletary*, 965 F.2d 952, 960 (11th Cir.1992) (The Constitution "requires a good deal less than maximum performance."), *cert. denied*, 515 U.S. 1165, 115 S.Ct. 2624, 132 L.Ed.2d 865 (1995).

f. *Mitigation*

[30] Karl claims that his counsel failed to competently investigate, prepare and present evidence at the mitigation hearing. We reject this claim.

The record shows that Karl's counsel presented numerous mitigating factors at the sentencing hearing. Counsel called a psychiatrist to testify about Karl's impulsiveness and introduced a report by a clinical psychologist. Counsel introduced Karl's confessions into evidence because he thought they presented a less egregious account of the events in the bank than the eyewitness account and because it bolstered Karl's impulsivity defense.

Furthermore, Walter's counsel introduced extensive mitigation evidence which applied equally to both Walter and Karl. Walter's counsel called Walter and Karl's sister to present mitigation evidence and her testimony about the nature of the LaGrand family applied equally to Karl and Walter.

We cannot say that counsel's performance fell outside the wide range of reasonable professional assistance. Counsel's assistance was therefore not ineffective. *See Paradis v. Arave*, 20 F.3d 950, 959 (9th Cir.1994) (counsel was not ineffective despite defendant's claim that counsel called only one mitigation witness and failed to develop information regarding defendant's oppressive upbringing and the fact that he was easily angered), *cert.*

denied, 513 U.S. 1117, 115 S.Ct. 915, 130 L.Ed.2d 796 (1995).

3. *Estoppel*

[31] Karl's present counsel submitted an affidavit of trial counsel in support of the claim that trial counsel had been ineffective. The affidavit was apparently prepared by present counsel. In response, the Arizona Attorney General's office sent a copy of the affidavit to the Arizona State Bar, pursuant to obligations under the State Bar's Ethical Rules, suggesting that Mr. Gerson, Karl's trial counsel, had admitted a violation of the Ethical Rules requiring competent representation.

Karl now argues that the State is estopped to continue to contend that trial counsel provided effective representation to Karl. The basic argument is that the State had asserted that trial counsel was incompetent and ineffective.

Karl's claim has no merit. The State has contended throughout all proceedings that trial counsel met the *Strickland* standard. Its letter to the bar did not say that trial counsel was incompetent and ineffective, but that his admissions demonstrated a violation of the Ethical Rules. If trial counsel, in falling on his sword, had admitted he was ineffective, the Attorney General's office believed it had a professional obligation under the Ethical Rules to bring it to the bar's attention. This is not sufficient to estop the State from continuing to contend, as it has throughout, that Karl received adequate representation.

B. *Karl's Motion for New Counsel*

[32] Shortly before trial, the trial court considered and rejected, after inquiry of Karl, his "Declaration of Conflict Between Attorney and Client" filed some forty-five days prior. The declaration said that trial counsel had failed to come to the prison to visit Karl in order to discuss the defense which the defendant wished to use.

[33] In reviewing the rejection of defendant's request for new counsel, we look at three factors: the timeliness of the request; the adequacy of the trial court's inquiry; and "whether the conflict between the defendant and his attorney was so great that it resulted in a total lack of communication between the defendant and his attorney." *Bland v. California Dep't of Corrections*, 20 F.3d 1469, 1475 (9th Cir.) (citation omitted), *cert. denied*, 513 U.S. 947, 115 S.Ct. 357, 130 L.Ed.2d 311 (1994).

[34] Here, Karl's request was filed forty-five days before trial, so it was timely. The trial court's inquiry went to the relationship between Karl and his trial counsel, not to the legal competency of trial counsel. *See id.* at 1476. The inquiry was adequate under the circumstances and did not reveal a total lack of communication between Karl and trial counsel.

Karl complained of inadequate time in meetings and of gloomy predictions by trial counsel. But the record discloses no total failure of communication. In fact, just moments before considering Karl's declaration, the trial court inquired about the pending motion for a mental condition examination. Trial counsel said that a decision had been made to withdraw the motion, stating both that "we've" decided and "I've" decided to withdraw the motion. The following exchange took place:

> THE COURT: Who decided?
>
> MR. GERSON: I did some time ago.
>
> THE COURT: Is that what your client wants?
>
> MR. GERSON: I've discussed it with him. He's not indicated otherwise.
>
> THE COURT: Well, unless he speaks up right now, I'm going to assume that you're speaking for him.
>
> DEFENDANT KARL LaGRAND: Yes, he's speaking for me.

In *Morris v. Slappy*, 461 U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983), the Supreme Court considered a similar claim. The assistant public defender assigned to the case was replaced just before trial because of health problems. Slappy complained that the new public defender did not have enough time to prepare, that his new lawyer had not talked to him much, and that the new lawyer told him he had no defense to the charges. In holding that the trial court properly denied Slappy's claims, the Supreme Court specifically rejected the argument that the Sixth

Amendment guaranteed a defendant a "meaningful relationship" with his lawyer. *Id.* at 13–14, 103 S.Ct. at 1617–18.

[35] Karl also argues that he was entitled to the appointment of a new lawyer to represent him in his request for a change in trial counsel. Karl cites no authority for this novel extension of the right to counsel, and we have found none. Karl had counsel at the time of his request who did not oppose the request. A motion to replace a criminal defendant's trial counsel admittedly creates a delicate situation for the lawyer, the defendant and the court. But bringing in a new lawyer is not required to protect the defendant's rights. The obligation of the trial court to inquire is by now well known, and an appropriate inquiry made by the trial judge will disclose whether the relationship has deteriorated to the point that communication has been destroyed. The defendant's self-interest and his lawyer's continuing professional obligation are sufficient to enable the trial court to make the necessary determination.

CONCLUSION

The judgment of the district court denying the petitions for writ of habeas corpus is AFFIRMED.

PREGERSON, Circuit Judge, dissenting:

I dissent because I believe that the LaGrands' challenge to Arizona's lethal gas statute is ripe for review.

The LaGrands are condemned prisoners in Arizona. Under Arizona's death penalty statute, the LaGrands will be executed by lethal injection unless they choose lethal gas. Ariz.Rev.Stat. § 13–704(B). In their petitions for habeas corpus, the LaGrands argue that execution by lethal gas is cruel and unusual punishment prohibited by the Eighth Amendment.

Because the LaGrands have not yet chosen lethal gas as the method of execution, the majority concludes that the LaGrands's challenge to the lethal gas statute "is not ripe and cannot be considered." In *Campbell v. Wood*, 18 F.3d 662 (9th Cir.1994) (en banc), however, we considered—and rejected—the mirror image of this theory: namely, that an Eighth Amendment challenge to a "choice" statute is nonjusticiable because a prisoner can choose a means of execution that renders the controversy moot. We held, in circumstances almost identical to those involved here, that a prisoner's challenge to Washington's death penalty statute was justiciable. *Id.* at 681. I can discern no principled distinction between the present case and *Campbell* to support their conflicting outcomes.

Moreover, the majority's opinion conflicts with established Supreme Court pronouncements on ripeness. In *Thomas v. Union Carbide Agricultural Products*, 473 U.S. 568, 581, 105 S.Ct. 3325, 3333, 87 L.Ed.2d 409 (1985), the Supreme Court determined that an issue is ripe for adjudication if it is "purely legal, and will not be clarified by further factual development." The LaGrands's claim is a purely legal one, and postponing a determination on the merits will not change the legal basis for decision.

I. JUSTICIABILITY OF A PRISONER'S CHALLENGE TO A DEATH PENALTY STATUTE

In *Campbell*, Charles Campbell, a condemned prisoner, challenged Washington's death penalty statute. *Campbell*, 18 F.3d 662. The statute provided for death by hanging unless the defendant chose lethal injection. *Id.* at 680 (citing Wash. Rev.Code 10.95.180(1)). Campbell argued that death by hanging was cruel and unusual punishment and that the statute therefore violated the Eighth Amendment. The State of Washington argued that Campbell's claim was nonjusticiable because he could render the controversy moot by choosing lethal injection instead of hanging. *Id.* at 681.

An en banc panel of this court unanimously rejected the State's argument. We stated that the "State's focus on Campbell's ability to choose lethal injection is misplaced" because the government may not "cloak unconstitutional punishments in the mantle of 'choice.'" *Id.* at 680–81.

We illustrated this principle with several of our earlier decisions. *Id.* (discussing *Dear Wing Jung v. United States*, 312 F.2d 73 (9th Cir.1962); *United States v. Terrigno*, 838 F.2d 371 (9th Cir.1988); and *United States v.*

Consuelo-Gonzalez, 521 F.2d 259 (9th Cir. 1975)). In *Dear Wing Jung*, for instance, we noted that departure from the United States as a condition of suspending a sentence was either cruel and unusual punishment or a denial of due process. We held that the condition did not escape review on the ground that the defendant could choose the constitutional punishment of a prison term: "It is not enough for the government to answer that such condition merely gave the defendant a choice.' For instance, if the condition were that the defendant must join a certain church, that would be an unconstitutional condition upon the sentence." *Dear Wing Jung*, 312 F.2d at 75–76.

Likewise, in *Terrigno* and *Consuelo-Gonzalez*, we considered the constitutionality of probation conditions, although in those cases as well, the defendant could have chosen to remain incarcerated. *Terrigno*, 838 F.2d at 374 (considering whether probation condition violated defendant's First Amendment rights); *Consuelo-Gonzalez*, 521 F.2d at 264 (considering whether probation condition violated defendant's Fourth Amendment rights). In light of these decisions, we held that Cambell's challenge to hanging was justiciable.

I fail to understand why Campbell's mere indication that he would elect death by hanging makes his claim more justiciable than the LaGrands's claim. Campbell's indication that he would choose death by hanging was not binding and not final. Indeed, Campbell's "choice" was not even specifically articulated-he said that he would be silent, which would result, by default, in death by hanging. When viewed in terms of legally binding, final decisions, the posture of the LaGrands's challenge is identical to that of Campbell.

Furthermore, the cases relied on in *Campbell* do not make the distinction that the majority makes. In fact, it appears that the prisoners in those cases-like the prisoners here-had not chosen the unconstitutional method of execution. *See Dear Wing Jung*, 312 F.2d at 73 (parenthetical); *Terrigno*, 838 F.2d at 374 (parenthetical); *Consuelo-Gonzalez*, 521 F.2d at 264 (parenthetical). Nor, apparently, did they "consistently maintain" that they would remain silent and elect, by default, the challenged method of death. Nevertheless, their claims were justiciable.

It is unreasonable to say that we will not decide whether the LaGrands claim is unconstitutional until the LaGrands choose the very method that they are challenging as cruel and unusual. Such a legal system would subject individuals to actual cruel or unusual punishment under an unconstitutional law until someone chooses lethal gas in order to assert a legal challenge against it.

II. SUPREME COURT LAW ON RIPENESS

The majority correctly chose the two-part test of *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967) to determine the ripeness of the LaGrands's claim. This test requires the court to "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149, 87 S.Ct. at 1515. The majority is mistaken, however, in its conclusion that this case is not ripe under *Abbott Laboratories.*

A. Fitness for Judicial Review

The majority insists on relying on the doctrine of ripeness as a justification for its delay in addressing the constitutionality of the Arizona death penalty statute. The majority's decision is inconsistent with the rationale of *Abbott Laboratories* and *Thomas*. In *Abbott Laboratories*, the Court found that where "the issue tendered is a purely legal one," the first prong of the ripeness test is satisfied. *Id.* As was true in *Abbott Laboratories*, the LaGrands's challenge presents a purely legal issue: Is Arizona's death penalty statute constitutional? In *Thomas*, the Court held that an issue is ripe if the issue "will not be clarified by further factual development." *Thomas v. Union Carbide Agric. Prods.*, 473 U.S. 568, 581, 105 S.Ct. 3325, 3333, 87 L.Ed.2d 409 (1985). Because the issue in this case "will not be clarified by further factual development," the LaGrands's challenge is purely legal and is therefore fit for judicial review.

No interest is served by delaying the resolution of the LaGrands purely legal claim. Whether or not the LaGrands ultimately chose lethal gas as the method of their execution will have absolutely no effect on the constitutional question that the LaGrands have raised.

B. Hardship to the Parties

Withholding court consideration will cause hardship to all parties involved—including, incidently, this court.

What should the LaGrands do after reading the majority's opinion? The lesson appears to be that if the LaGrands, like Campbell, "consistently maintain" that they will elect an arguably unconstitutional method of execution, then the LaGrands can challenge that method. Therefore, the obvious course for the LaGrands is to begin to "consistently maintain" that they will choose gas. (They need not *actually* choose gas.) The LaGrands's claim will then be ripe and will someday return to our court.[1]

Postponing review of the LaGrands's Eighth Amendment challenge will cause hardship to the LaGrands as well. Instead of receiving this court's deliberate and thoughtful consideration of their challenge, the LaGrands will be forced to present their claim in a "last-minute" habeas petition.

Nor does Arizona gain anything from the majority's reluctance to address the issue. In fact, the majority's decision frustrates Arizona's alleged interest in executing the LaGrands without undue delay by providing another ground for a future "last-minute" appeal.

Finally, I note the prudential concern in addressing the LaGrands's claims now. The majority opinion conflicts with the federal policy to resolve habeas petitions as early as possible. The majority's decision defeats this policy by postponing a decision on the merits until after the LaGrands choose to be executed by lethal gas. Do we want to see the LaGrands's challenge to lethal gas presented by a flurry of faxes as the hour of execution looms? Do we wish to make an important decision in harried circumstances?

Under the majority's decision, Arizona has successfully accomplished exactly what we feared in *Campbell:* it has cloaked an unconstitutional punishment in the mantle of "choice." *Campbell,* 18 F.3d at 680. Because the majority has offered no satisfactory explanation why Cambell's claim was justiciable while the LaGrands's claim is not, I respectfully dissent.

Boris Victorovich BOLSHAKOV; Elena Alekseevna Litvinova, Petitioners,

v.

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 96-70615.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Nov. 7, 1997.

Decided Jan. 16, 1998.

Aliens petitioned for review of decision of Board of Immigration Appeals (BIA) denying motion to reopen their asylum case, and made separate motion for reopening and

---

[1] Arizona's "choice" statute at issue provides in part:

> § 13-704. Method of infliction of sentence of death
>
> . . . .
>
> B. A defendant who is sentenced to death for an offense committed before November 23, 1992 shall choose either lethal injection or lethal gas at least twenty days before the execution date. If the defendant fails to choose either lethal injection or lethal gas, the penalty of death shall be inflicted by lethal injection.

Ariz.Rev.Stat. § 13-704. Nothing in my reading of the statute prevents a prisoner from "maintaining" that he will choose gas, and then actually choose lethal injection twenty days before his execution date.

In fact, nothing in the statute seems to preclude a defendant from *actually* choosing gas well before the twenty-day mark, and then changing his mind and making lethal injection his final choice.

The panel's ripeness analysis would encourage this choice-changing, which is a traumatizing experience for the defendant and a bureaucratic headache for the judicial system.

Annex MG 11

SUPREME COURT OF THE UNITED STATES, *KARL AND WALTER LAGRAND* V. *STEWART* (7 DECEMBER 1998).

SOURCE: 119 S.CT. 422

119 S.Ct. 422 (Mem)

142 L.Ed.2d 343, 67 USLW 3300

(Cite as: 119 S.Ct. 422)

Karl Hinze LaGRAND and Walter Burnhart LaGrand, petitioners,

v.

Terry L. STEWART, Director, Arizona Department of Corrections.

No. 98-5911.

Supreme Court of the United States

Nov. 2, 1998.

Rehearing Denied Dec. 7, 1998.

See U.S. , 119 S.Ct. 610.

Case below. 133 F.3d 1253.

Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied.

119 S.Ct. 610 (Mem)
67 USLW 3375
(Cite as: 119 S.Ct. 610)

Karl Hinze LaGRAND and Walter Burnhart LaGrand, petitioners,
v.
Terry L. STEWART, Director, Arizona Department of Corrections.
No. 98-5911.

Supreme Court of the United States

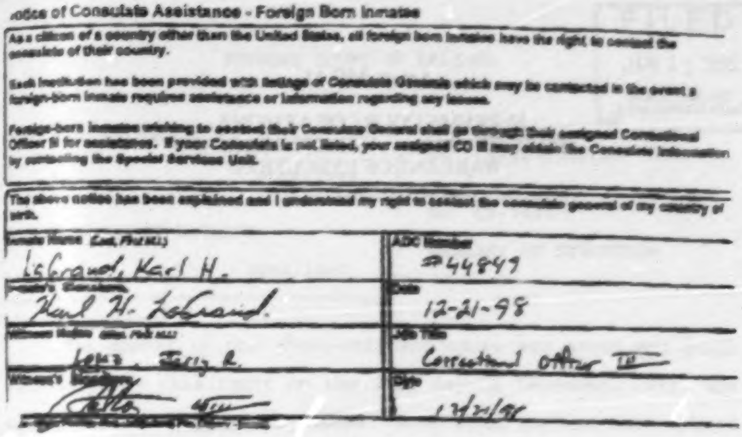
Dec. 7, 1998.

Former decision, 119 S.Ct. 422.

Petition for rehearing denied.

Annex MG 12

NOTICE OF CONSULATE ASSISTANCE TO KARL LAGRAND
(21 DECEMBER 1998)



otice of Consulate Assistance - Foreign Born Inmates

As a citizen of a country other than the United States, all foreign born inmates have the right to contact the consulate of their country.

Each Institution has been provided with listings of Consulate Generals which may be contacted in the event a foreign-born inmate requires assistance or information regarding any issues.

Foreign-born inmates wishing to contact their Consulate General shall go through their assigned Correctional Officer III for assistance. If your Consulate is not listed, your assigned CO III may obtain the Consulate information by contacting the Special Services Unit.

The above notice has been explained and I understand my right to contact the consulate general of my country of birth.

nmate Name (Last, First M.I.) LaGrand, Karl H.	ADC Number #44849
nmate's Signature Karl H. LaGrand.	Date 12-21-98
Witness Name (Last, First M.I.) Lopez, Jerry R.	Job Title Correctional Officer III
Witness's Signature	Date 12/21/98

Annex MG 13

SUPREME COURT OF ARIZONA,
STATE OF ARIZONA V. *WALTER LAGRAND*,
WARRANT OF EXECUTION
(15 JANUARY 1999)

FILED
JAN 15 1999
NOEL K. DESSAINT
CLERK SUPREME COURT
BY

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,) Supreme Court
) No. CR-84-0346-AP [6457]
Appellee,)
) Pima County
vs.) No. CR-7426
)
WALTER BURNHART LaGRAND,) **WARRANT OF EXECUTION**
)
Appellant.)

The appeal in the above-entitled cause was heard and fully considered by this Court on the 19th day of December, 1985, and having finally decided the cause, this Court on the 30th day of January, 1987, did affirm the judgment of the Superior Court of Pima County, State of Arizona, and did file its opinion, which opinion is now of record in this Court, is still in effect, and, as shown by this Court's record, has not been stayed or affected by any subsequent decision of this or any other Court.

WHEREAS, the Attorney General having filed a Motion for Warrant of Execution, which was granted by this Court on the 12th day of January, 1999,

IT IS ORDERED, that, Wednesday, the 3rd day of March, 1999, be and the same is hereby fixed as the date for commencement of the execution time period when the judgment and sentence of death pronounced upon the appellant, WALTER BURNHART LaGRAND, by the Superior Court of Pima County, State of Arizona, shall be executed by administering to WALTER BURNHART LaGRAND an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, except that WALTER BURNHART LaGRAND shall have the choice of either lethal injection or lethal gas.

IT IS FURTHER ORDERED that this Warrant is valid for twenty-four (24) hours beginning at an hour to be designated by the Director of the State Department of Corrections, with written notice of said designated hour to be given to the Supreme Court and parties at least twenty (20) calendar days prior to March 3, 1999.

IT IS FURTHER ORDERED that the Clerk of this Court forthwith prepare and certify under his hand and the seal of this Court a full, true and correct copy of this Warrant, and cause the same to be delivered to the Director of the Department of Corrections and the Superintendent of the State Prison, at Florence, Arizona, and the same shall be sufficient authority to them for the execution of the appellant, WALTER BURNHART LaGRAND, as commanded by the judgment and sentence of death pronounced against WALTER BURNHART LaGRAND, by the Superior Court of Pima County, State of Arizona, on the 14th day of December, 1984.

IT IS FURTHER ORDERED that, upon the execution of WALTER BURNHART LaGRAND, the Superintendent shall, pursuant to Rule 31.17(c), Rules of Criminal Procedure, forthwith make a return upon this Warrant to the Supreme Court of Arizona, which return shall show the time, mode and manner of execution.

Dated in the City of Phoenix, Arizona, at the Arizona Courts Building, this 15th day of January, 1999.

Thomas Zlaket

THOMAS A. ZLAKET, Chief Justice

Charles E. Jones

CHARLES E. JONES, Vice Chief Justice

Stanley G. Feldman

STANLEY G. FELDMAN, Justice

FREDERICK J. MARTONE, Justice

Ruth V. McGregor

RUTH V. McGREGOR, Justice

Annex MG 14

LETTER OF GERMAN PRESIDENT HERZOG
TO U.S. PRESIDENT CLINTON
(5 FEBRUARY 1999)

Der Präsident
der
Bundesrepublik Deutschland

Berlin, den 5. Februar 1999

Seiner Exzellenz
dem Präsidenten
der Vereinigten Staaten von Amerika
Herrn William J. Clinton

Washington D.C.
USA

Sehr geehrter Herr Präsident,

in Arizona sind - wie Ihnen sicherlich bekannt ist - die Termine für die Hinrichtung der deutschen Staatsangehörigen Karl-Heinz und Walter LaGrand auf den 24. Februar und den 3. März 1999 festgesetzt worden. Alle erfolgversprechenden Rechtsmittel gegen die Verurteilung der beiden Brüder dürften ausgeschöpft sein. An der Berechtigung der Verurteilung habe ich ebensowenig Zweifel wie an der Rechtsstaatlichkeit der Verfahren vor den Gerichten des Staates Arizona bzw. den Bundesgerichten.

In dieser Lage kann nur noch eine Gnadenentscheidung die Vollstreckung der Todesstrafen verhindern. Ich bin mir dessen bewußt, daß Sie keine rechtlichen Möglichkeiten haben, die Gnadenentscheidung der Gouverneurin von Arizona, Frau Jane Dee Hull, zu beeinflussen. Ich wäre Ihnen aber sehr dankbar, wenn Sie sich bei Frau Hull für eine Begnadigung der beiden Verurteilten verwenden würden und ihr meine Gründe für diese Bitte übermittelten. Mir ist nicht nur die

Abschaffung der Todesstrafe seit vielen Jahren aus humanen wie rechtlichen Erwägungen ein persönliches Anliegen; vielmehr spielen für mich auch die Umstände des Falles der Brüder LaGrand eine Rolle: Das Verbrechen liegt nun schon 17 Jahre zurück. Die Täter sind seit dieser Zeit in Haft und leben unter dem ständigen seelischen Druck der drohenden Vollstreckung der Todesstrafe. Nach allem, was ich weiß, waren die Brüder LaGrand zum Zeitpunkt der Tat 19 und 20 Jahre; in ihrer Jugend hatten sie es nicht leicht. Sie wären - auch darauf möchte ich hinweisen - in diesem Jahrhundert die ersten deutschen Staatsangehörigen, die in den Vereinigten Staaten von Amerika hingerichtet würden.

Mit freundlichen Grüßen

Roman Herzog

Translation

The President
of the Federal Republic of Germany

Berlin, February 5, 1999

Dear Mr. President:

In Arizona, as I am sure you know, dates have been set for the executions of the German nationals Karl-Heinz and Walter LaGrand, namely February 24 and March 3, 1999. The brothers' conviction has apparently been appealed at all possible instances where it stood a chance of success. In no way do I doubt the legitimacy of the conviction nor the fairness of the procedure before the courts of the State of Arizona and the federal courts.

In this situation only granting a pardon can prevent the execution of the death penalty. I am aware that you have no means at law to influence the decision in this regard of Ms. Jane Dee Hull, the Governor of Arizona. However, I would be extremely grateful were you to present the case for pardoning both convicts and relay to her my reasons for this request. I have for many years been in favor of abolishing the death penalty for humane as well as legal reasons. Above and beyond this, it seems to me that the circumstances of the LaGrand brothers' case are also relevant: the crime is now 17 years in the past, and the offenders have been in jail since that time living under the constant psychological pressure of their impending execution. According to what I know of the facts, the LaGrand brothers were 19 and 20 years old at the time of the offense and had not had an easy childhood. I would also like to point out that were the sentence to be carried out, they would be the first German nationals to be executed in the United States of America this century.

Sincerely yours,

/s/ Roman Herzog

The Honorable
William J. Clinton
President of the
United States of America

Washington, D.C.
USA

Annex MG 15

LETTER OF GERMAN CHANCELLOR SCHRÖDER
TO U.S. PRESIDENT CLINTON
(2 FEBRUARY 1999)

BUNDESREPUBLIK DEUTSCHLAND
DER BUNDESKANZLER

[illegible]nn, den 2. Februar 1999

Seiner Exzellenz
dem Präsidenten
der Vereinigten Staaten von Amerika
Herrn William J. Clinton
Weißes Haus

Washington, D.C.

Sehr geehrter Herr Präsident,

im Bundesstaat Arizona sollen die 1984 wegen Raubmordes zum Tode verurteilten Brüder Walter und Karl-Heinz LaGrand in Kürze hingerichtet werden.

Wie Sie wissen, lehnt die Bundesregierung die Todesstrafe ab und setzt sich weltweit für ihre Abschaffung ein. Ich habe daher an die Gouverneurin den in Kopie beigefügten Brief gerichtet. Ich wäre Ihnen sehr dankbar, wenn Sie mein Anliegen unterstützen und sich für eine Begnadigung der Brüder LaGrand einsetzen könnten.

Mit freundlichen Grüßen

Translation

The Federal Republic of Germany
The Federal Chancellor

Bonn, February 2, 1999

The Honorable
William J. Clinton,
President of the United States of America
The White House
Washington, D.C.

Dear Mr. President:

The two brothers Walter and Karl-Heinz LaGrand, who were sentenced to death in 1984 for murder with robbery, are shortly to be executed in the State of Arizona.

As you know, the German Government rejects the death penalty and is committed to abolishing it worldwide. I therefore sent a letter to the Governor in this matter, (please find copy enclosed). I would be very grateful if you could support my request and work towards a pardon for the LaGrand brothers.

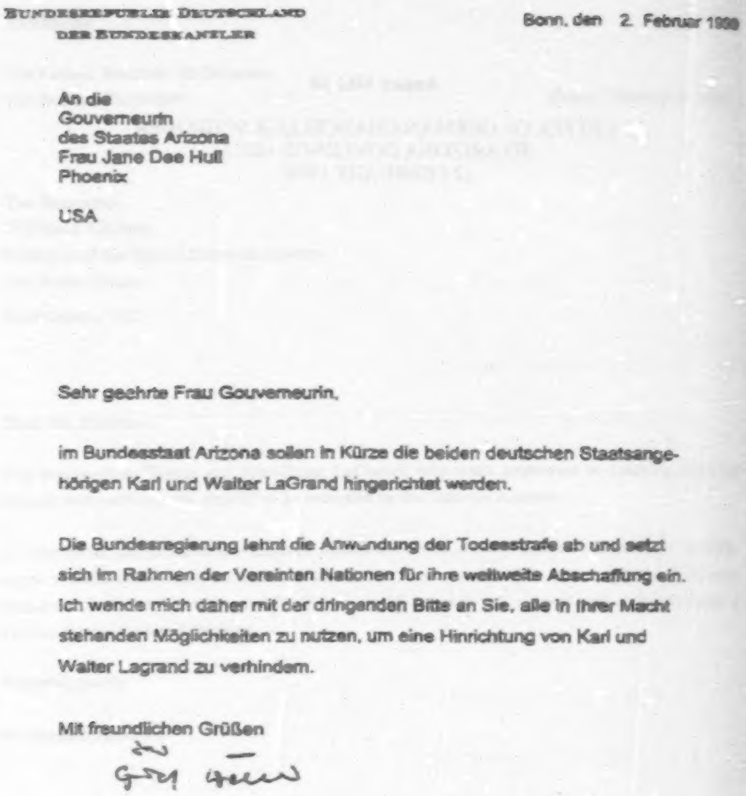
Sincerely yours,

/s/ Gerhard Schröder

Annex MG 16

LETTER OF GERMAN CHANCELLOR SCHRÖDER TO ARIZONA GOVERNOR HULL

(2 FEBRUARY 1999)



BUNDESREPUBLIK DEUTSCHLAND
DER BUNDESKANZLER

Bonn, den 2. Februar 1999

An die
Gouverneurin
des Staates Arizona
Frau Jane Dee Hull
Phoenix

USA

Sehr geehrte Frau Gouverneurin,

im Bundesstaat Arizona sollen in Kürze die beiden deutschen Staatsangehörigen Karl und Walter LaGrand hingerichtet werden.

Die Bundesregierung lehnt die Anwendung der Todesstrafe ab und setzt sich im Rahmen der Vereinten Nationen für ihre weltweite Abschaffung ein. Ich wende mich daher mit der dringenden Bitte an Sie, alle in Ihrer Macht stehenden Möglichkeiten zu nutzen, um eine Hinrichtung von Karl und Walter Lagrand zu verhindern.

Mit freundlichen Grüßen

Translation

The Federal Republic of Germany
The Federal Chancellor

Bonn, February 2, 1999

Ms. Jane Dee Hull
Governor of the State of Arizona
Phoenix
USA

Madam Governor:

The two German citizens Karl and Walter LaGrand are shortly to be executed in the State of Arizona.

The German Government rejects the use of the death penalty and is committed within the United Nations to abolishing it worldwide. I therefore urgently appeal to you to use every means at your disposal to prevent the execution of Karl and Walter LaGrand.

Sincerely,

/s/ Gerhard Schröder

Annex MG 17

LETTER OF GERMAN FOREIGN MINISTER FISCHER TO U.S. SECRETARY OF STATE ALBRIGHT (27 JANUARY 1999)

DER BUNDESMINISTER
DES AUSWÄRTIGEN

Bonn, den 27. Januar 1999

Ihrer Exzellenz
der Außenministerin der
Vereinigten Staaten von Amerika
Frau Madeleine Albright

Washington D.C.

Liebe Madeleine,

mein Eintreten für eine weltweite Abschaffung der Todesstrafe ist Dir bekannt. Mit Bestürzung habe ich erfahren, daß nun erstmals zwei deutschen Staatsangehörigen in den USA die Hinrichtung droht. Karl und Walter Lagrand wurden 1984 wegen eines 1982 begangenen Raubmordes zum Tod verurteilt. Der Staat Arizona hat den Termin für ihre Hinrichtung bereits festgesetzt. Soweit mir bekannt ist, ist der Rechtsweg erschöpft. Die drohenden Hinrichtungen können allein durch eine Begnadigung durch die Gouverneurin von Arizona, Frau Jane Dee Hull, verhindert werden.

Die Hinrichtung von zwei deutschen Staatsangehörigen würde in der deutschen Öffentlichkeit auf Unverständnis stoßen.

Ich habe deswegen den in Kopie anliegenden Brief an die Gouverneurin des Staates Arizona, Frau Jane Dee Hull, gerichtet. Ich würde mich freuen, wenn auch Du mein Anliegen gegenüber Gouverneurin Hull unterstützen und Dich mit mir für eine Begnadigung von Karl und Walter Lagrand einsetzen würdest.

Mit freundlichen Grüßen

Translation

The Federal Minister
for Foreign Affairs

Bonn, January 27, 1999

The Honorable
Madeleine Albright
Secretary of State of the
United States of America

Washington, D.C.

Dear Madeleine:

You are well aware of my stance for the worldwide abolition of the death penalty. I was disturbed to learn that for the first time two German citizens are facing execution. Karl and Walter Lagrand were given the death penalty in 1984 for murder with robbery committed in 1982. The State of Arizona has already set a date for the execution. As far as I can tell, all legal avenues have been pursued. The imminent executions can only be prevented by a reprieve on the part of Ms. Jane Dee Hull, the Governor of Arizona.

The execution of two German citizens would meet with total incomprehension on the part of the German public.

Therefore I have sent the enclosed letter to Ms. Jane Dee Hull, Governor of the State of Arizona. I would be grateful, if you would support my approach to Governor Hull and join me in my attempt to procure a reprieve for Karl and Walter Lagrand

Yours sincerely,
/s/ J. Fischer

Annex MG 18

LETTER OF GERMAN FOREIGN MINISTER FISCHER TO U.S. SECRETARY OF STATE ALBRIGHT (22 FEBRUARY 1999)

DER BUNDESMINISTER
DES AUSWÄRTIGEN

Bonn, 22. Feb. 1999

Ihrer Exzellenz
der Außenministerin der
Vereinigten Staaten von Amerika
Frau Madeleine Albright

Washington D.C.

Liebe Madeleine,

Dein Schreiben vom 12. Februar 1999, in dem Du mir mitteilst, daß Du leider nicht in der Lage bist, das Gnadengesuch im Verfahren gegen die Gebrüder LaGrand zu unterstützen, habe ich erhalten.

Ich möchte darauf noch einmal zurückkommen. Denn die Angelegenheit ist für die Bundesregierung und die deutsche Öffentlichkeit von großer Bedeutung.

Neben den humanitären Erwägungen, die ich Dir bereits in meinem letzten Schreiben vom 27. Januar 1999 geschildert habe, spielt auch eine Rolle, daß die Gebrüder LaGrand nicht über ihre Rechte nach Artikel 36 des Wiener Übereinkommens über Konsularische Beziehungen unterrichtet wurden. Dies ist der Grund, weshalb ich für die Bundesregierung nochmals die Bitte äußere, daß Du Dich gegen eine Vollstreckung des Todesurteils gegen die Brüder LaGrand einsetzt. Wegen der Verletzung des WÜK hast Du Dich im November letzten Jahres im Fall des Kanadiers J.S. Faulder an den Vorsitzenden des Gnadenausschusses von Texas gewandt. Eine rechtliche Einschätzung des Falles füge ich bei.

Mit freundlichen Grüßen

gez. Fischer
im Original unterschrieben

Translation

The Federal Minister
for Foreign Affairs

Bonn, February 22, 1999

Dear Madeleine:

Thank you very much for your letter of February 12, 1999 in which you informed me that you are unfortunately unable to support the appeal for clemency in the proceedings against the LaGrand brothers.

I would like to raise this matter again for it is of great importance to the German Government and public. Furthermore, it is well known that you were prepared to approach the Governor of Virginia in the case of the Paraguayan A.F. Breard because the Vienna Convention had been violated. On the same grounds you appealed to the chairman of the clemency board of Texas last November in the case of the Canadian J.S. Faulder.

In addition to the humanitarian considerations I outlined in my letter of January 27, 1999, the fact that the LaGrand brothers were not informed of their rights under Article 36 of the Vienna Convention on Consular Relations is also of consequence.

That is why I am asking you once more on behalf of the German Government to speak out against the execution of the death sentences against the LaGrand brothers.

I enclose a legal assessment of the case.

Sincerely,
/s/ J. Fischer

In the case of Karl and Walter LaGrand

Memorandum

submitted by the German Government

1. Article 36, subparagraph 1 (b), of the Vienna Convention on Consular Relations (the "Vienna Convention") requires the competent authorities of a State party to advise, "without delay", a national of another State party whom such authorities arrest or detain of the national's right to consular assistance guaranteed by Article 36:

> "If he so requests, the competent authorities of the receiving State, shall, without delay, inform the consular post of the sending State if, within its consular district, a national of the State is arrested or committed to prison or custody pending trial or is detained in any other manner."

2. As the United States stated before the International Court of Justice in its Memorial in the case concerning *United States Diplomatic and Consular Staff in Tehran*,

> "a principle function of the consular officer is to provide varying kinds of assistance to nationals of the sending State, and for this reason the channel of communication between consular officers and nationals must at all times remain open. Indeed such communication is so essential to the exercice of consular functions that its preclusion would render meaningless the entire establishment of consular relations... Article 36 establishes rights not only for the consular officer but, perhaps more importantly, for the nationals of the sending State who are assured access to consular officers and through them to others." (I.C.J. Pleadings, p. 174).

3. In the recent *Case Concerning the Vienna Conventon on Consular Relations* (Paraguay v. U.S.A.), Judge Schwebel, in his Declaration appended to the unanimous Order of the Court for a stay of execution of a national of Paraguay, stated:

> "It is of obvious importance to the maintenance and development of a rule of law among States that the obligations imposed by treaties be complied with and that, where they are not, reparation be required. The mutuality of interest of States in the effective observance of the obligations of the Vienna Convention on Consular Relations is the greater in the intermixed global community of today and tomorrow (and the citizens of the United States)" (Order of 9 April 1998).

4. In 1982, the authorities of the State of Arizona detained two German nationals, Karl and Walter LaGrand. These German nationals were tried and sentenced to death without being advised of their rights to consular assistance, as guaranteed to them by Article 36, subparagraph 1 (b), of the Vienna Convention.

5. It has been the contention of the authorities of the State of Arizona that they had been unaware of the fact that Karl and Walter LaGrand were nationals of Germany. While Germany accepts that the authorities of the State of Arizona may not have intentionally deprived the German nationals of their rights to consular assistance, the unalterable fact remains that they were tried and sentenced without the possibility of such assistance. Negligence, unintentional or otherwise, on the part of the authorities of the State of Arizona does not absolve the United States of America from being in breach of Article 36, subparagraph i (b), of the Vienna Convention. Indeed, under the requirement of due diligence and good faith applicable in international relations, the authorities of the State of Arizona should have established the foreign nationality of the detainees. Karl and Walter LaGrand were born in Germany. Their mother was a German national. These informations, gleaned by the authorities of the State of Arizona from the detention forms, clearly laid grounds for further investigation as to the nationality of the detained brothers, and put the onus on the authorites – per Article 36, subparagraph 1 (b) of the Vienna Convention – to determine their nationality and to inform the German consular officers.

6. The failure to provide the required notification precluded Germany from protecting its nationals interests in the United States provided for by Articles 5 and 36 of the Vienna Convention at both the trial and the appeal level in the State courts. It was only in 1992, when all legal avenues at the State level had been exhausted, that the German consular officers were made aware, not by the authorities of the State of Arizona, but by the detainees themselves, of the case in question.

7. The possibility cannot be excluded that this lack of consular assistance did have an impact on the criminal proceedings. Indeed, when Karl and Walter LaGrand, finally whith the assistance of German consular officers, did claim violations of the Vienna Convention before the Federal court of first instance, that court rejected the assertion of this and other claims based on a municipal doctrine of procedural default. Applying this doctrine, the court decided that, because Karl and Walter LaGrand had not asserted their rights under the Vienna Convention in the previous legal proceedings at State level, they could not assert them in the Federal *habeas corpus* proceedings. This municipal law doctrine was held to bar such relief even

though, first, Karl and Walter LaGrand were unaware of their rights under the Convention at the time of the earlier proceedings, and second, they were unaware of their rights precisely because the legal authorities failed to comply with their obligations under the Vienna Convention promptly to inform them of those rights. All appeals at the Federal level – including to the US Supreme Court – have failed. Karl LaGrand's date of execution has been set for 24 February 1999. Walter LaGrand is to be executed on 3 March 1999.

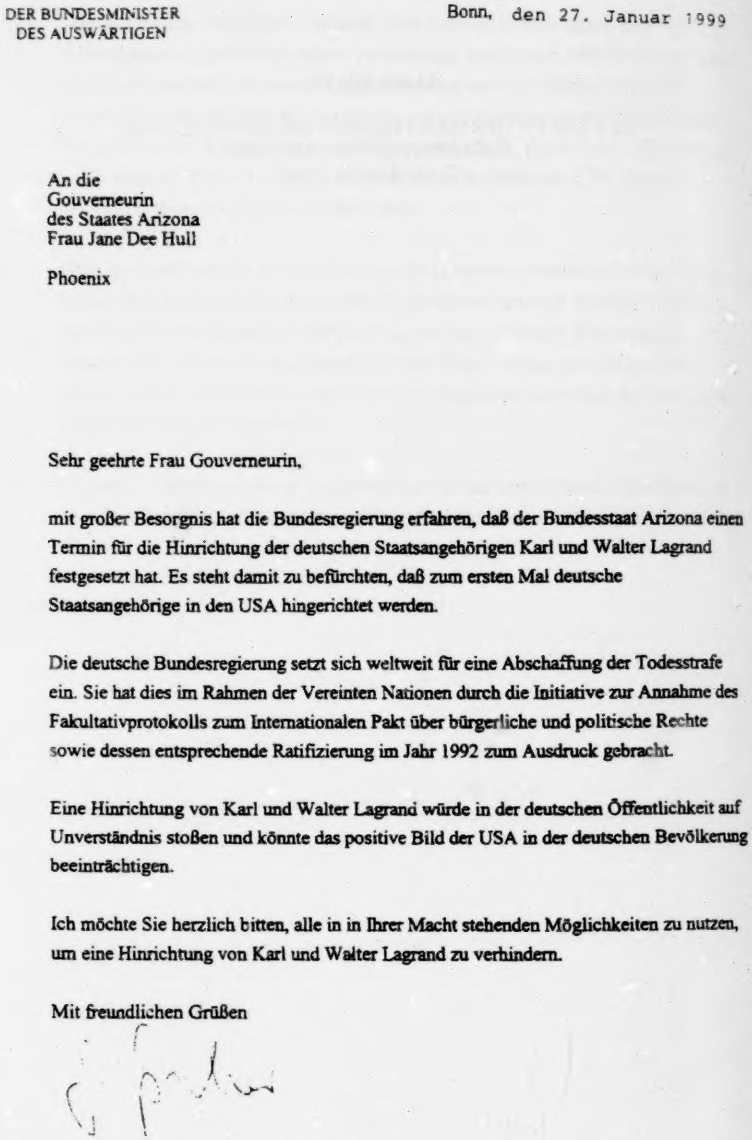
9. Germany is not seeking any relief barring the competent authorities of the United States from enforcing its criminal law or, specifically, retrying Karl and Walter LaGrand if the competent authorities are so advised. Germany does contend, however, that the competent authorities of the United States must enforce the criminal law by means that comport with the obligations undertaken by the United States in the Vienna Convention.

10. Germany is therefore seeking the good offices of the United States Department of State in order that the sentence of death for Karl and Walter LaGrand be set aside.

22 February 1999

Annex MG 19

LETTER OF GERMAN FOREIGN MINISTER FISCHER TO ARIZONA GOVERNOR HULL (27 JANUARY 1999)



DER BUNDESMINISTER
DES AUSWÄRTIGEN

Bonn, den 27. Januar 1999

An die
Gouverneurin
des Staates Arizona
Frau Jane Dee Hull

Phoenix

Sehr geehrte Frau Gouverneurin,

mit großer Besorgnis hat die Bundesregierung erfahren, daß der Bundesstaat Arizona einen Termin für die Hinrichtung der deutschen Staatsangehörigen Karl und Walter Lagrand festgesetzt hat. Es steht damit zu befürchten, daß zum ersten Mal deutsche Staatsangehörige in den USA hingerichtet werden.

Die deutsche Bundesregierung setzt sich weltweit für eine Abschaffung der Todesstrafe ein. Sie hat dies im Rahmen der Vereinten Nationen durch die Initiative zur Annahme des Fakultativprotokolls zum Internationalen Pakt über bürgerliche und politische Rechte sowie dessen entsprechende Ratifizierung im Jahr 1992 zum Ausdruck gebracht.

Eine Hinrichtung von Karl und Walter Lagrand würde in der deutschen Öffentlichkeit auf Unverständnis stoßen und könnte das positive Bild der USA in der deutschen Bevölkerung beeinträchtigen.

Ich möchte Sie herzlich bitten, alle in in Ihrer Macht stehenden Möglichkeiten zu nutzen, um eine Hinrichtung von Karl und Walter Lagrand zu verhindern.

Mit freundlichen Grüßen

Translation

The Federal Minister
for Foreign Affairs

Bonn, January 27, 1999

Ms. Jane Dee Hull
Governor of the
State of Arizona

Phoenix

Dear Governor:

It was with great concern that the Federal Government learnt that the State of Arizona has set a date for the execution of the German citizens Karl and Walter Lagrand. It is feared that, for the first time, German citizens will be executed in the USA.

The German Government is aiming for the worldwide abolition of the death penalty. The Government made this wish clear within the United Nations framework through the Initiative for the Adoption of the Optional Protocol of the International Covenant on Civil and Political Rights as well as through its ratification in 1992.

The execution of Karl and Walter Lagrand would meet with total incomprehension on the part of the German public and could cast a shadow on the population's positive image of the USA.

I would urge you to do everything in your power to prevent the execution of Karl and Walter Lagrand.

Yours sincerely,
/s/ J. Fischer

Annex MG 20

LETTER OF GERMAN MINISTER OF JUSTICE DÄUBLER-GMELIN TO U.S. ATTORNEY GENERAL RENO
(27 JANUARY 1999)

PROF. DR. HERTA DÄUBLER-GMELIN MdB
BUNDESMINISTERIN DER JUSTIZ

HEINEMANNSTRASSE 6
53175 BONN
TELEFON (02 28) 58 40 00
TELEFAX (02 28) 58 46 64

I. E.
der Justizministerin der
Vereinigten Staaten von Amerika
Frau Janet Reno
Department of Justice
Constitution Avenue between 9th and 10th

Washington, D. C., 20530
U.S.A.

Sehr geehrte Frau Kollegin,

ich wende mich heute mit einem Anliegen an Sie, bei dem ich sehr auf Ihr Verständnis hoffe.

Wie Ihnen sicherlich bekannt ist, sind in Arizona nach der negativen Entscheidung des US-Supreme Court in dem Verfahren um die Zulassung der Revision die Hinrichtungstermine für die deutschen Staatsangehörigen Karl-Heinz und Walter LaGrand auf den 24. Februar und den 3. März 1999 festgesetzt worden. Da alle erfolgversprechenden Rechtsmittel ausgeschöpft sein dürften, kann nur noch eine Gnadenentscheidung die Vollstreckung der erkannten Todesstrafen verhindern.

Mir ist durchaus bewußt, daß Sie keine rechtlichen Möglichkeiten haben, auf die Gnadenentscheidung Einfluß zu nehmen, da diese von der Gouverneurin von Arizona, Frau Jane Dee Hull, getroffen werden muß. Ich möchte Sie aber sehr herzlich bitten, sich bei Frau Hull für eine Bewilligung der Gnadengesuche der beiden Verurteilten zu verwenden.

Unstreitig haben die Brüder LaGrand ein furchtbares Verbrechen begangen, das in seiner Durchführung von einer besonderen Brutalität gekennzeichnet ist. Auch aus meiner Sicht bestehen keine Zweifel an der Schwere der Schuld, die die Verurteilten mit diesem Verbrechen auf sich geladen haben, ebensowenig an der Rechtsstaatlichkeit der Verfahren vor den Gerichten des Staates Arizona bzw. den Bundesgerichten, die letztlich zur Rechtskraft der Todesurteile geführt haben.

Es geht vielmehr um die Todesstrafe im generellen und bezüglich der Brüder LaGrand im speziellen.

Ich bin mir darüber im klaren, daß in unseren beiden Ländern Sinn und Zweck staatlichen Kriminalstrafen unterschiedlich beurteilt werden. Ich möchte daher auch nicht das Für und Wider der Todesstrafe intensiver beleuchten. Lassen Sie mich aber auf zwei Punkte hinweisen, von denen ich annehmen, daß in Ihrer Beurteilung Einvernehmen besteht und die aus meiner Sicht deutlich gegen die Todesstrafe sprechen:

Zum einen ist die immer wieder behauptete generalpräventive Wirkung der Todesstrafe durchaus zweifelhaft. Zum anderen stellt die Vollstreckung einer Todesstrafe einen unwiderruflichen staatlichen Schritt dar, der es der staatlichen Gemeinschaft verwehrt, zu einem möglicherweise fernliegenden späteren Zeitpunkt die Verbrechen als gesühnt anzusehen und den Straftätern den Weg in die Gemeinschaft wieder zu eröffnen.

Mit Blick auf die Brüder LaGrand im speziellen ist darauf hinzuweisen, daß das Verbrechen nun schon 17 Jahre zurückliegt, die Täter seit dieser Zeit in Haft sind und seit Jahren unter dem ständigen seelischen Druck der Drohung der Vollstreckung der Todesstrafe leben. Zum Tatzeitpunkt waren die Brüder LaGrand 19 und 20 Jahre alt und hatten – soweit mir bekannt ist – eine zumindest als problematisch zu bezeichnende Jugend verbracht. Letztlich möchte ich noch darauf hinweisen, daß die Brüder LaGrand die ersten deutschen Staatsangehörigen wären, die – zumindest in diesem Jahrhundert - in den Vereinigten Staaten von Amerika hingerichtet würden. Eine Begnadigung wäre daher auch unter justizpolitischen Gesichtspunkten außerordentlich zu begrüßen. Ich wäre Ihnen, sehr geehrte Frau Kollegin, daher sehr verbunden, wenn Sie meiner Bitte entsprechen könnten und sich bei Frau Hull nachhaltig für die Begnadigung der Brüder LaGrand einsetzen würden.

Für Ihre Bemühungen danke ich Ihnen im voraus herzlich und verbleibe mit freundlichen Grüßen

Her Excellency
The Attorney General of the United States of America
Ms. Janet Reno
Department of Justice
Constitution Avenue between 9th and 10th

Washington D.C. 20530
USA

Dear Attorney General Reno,

I am approaching you today on a matter where I trust you will appreciate why I am taking this step.

As you are bound to know, the dates have been fixed for the execution of the German nationals Karl-Heinz and Walter LaGrand in Arizona on 24 February and 3 March 1999 following the negative decision of the US Supreme Court in the proceedings for leave to appeal. Seeing that all legal remedies offering prospects of success appear to have been exhausted, only clemency can prevent execution of the death penalties imposed.

I am well aware that you do not have any legal avenues for influencing the decision on whether to grant clemency since this decision has to be taken by the Governor of Arizona, Ms. Jane Dee Hull. Despite this, I would most cordially ask you to intercede with Ms. Hull for clemency to be granted to the two sentenced offenders.

It is beyond dispute that the LaGrand brothers committed a dreadful crime, marked by the fact that it was carried out with particular brutality. From my point of view as well, there are no doubts about the gravity of the guilt these sentenced offenders bear for the crime they committed, nor are there any doubts about the fact that the proceedings were conducted under the Rule of Law –ultimately leading to imposition of the death penalties with final and binding effect - before the courts of the State of Arizona and before the Federal Courts.

My concern is just with the death penalty in general and with the particular case of the LaGrand brothers.

I realise that the conception and the purpose of state criminal penalties are evaluated differently in our two countries. Hence I also do not wish to examine the pros and cons of the death penalty more intensively. But let me just refer to two points where I believe there is agreement on their evaluation and which I think clearly speak against the death penalty:

On the one hand, the repeatedly contended general preventive impact of the death penalty is certainly open to doubt. On the other hand, execution of a death penalty constitutes an irrevocable step by the state denying the community the opportunity of regarding - at a later stage, possibly in the distant future - the crimes committed as atoned for and of enabling criminal offenders to find their way back into the community again.

With regard to the LaGrand brothers in particular, attention must be drawn to the fact that 17 years have already elapsed since the crime was committed, that the offenders have been in prison since then and that they have been living for years under the constant mental pressure of the threat of execution of the death penalty. At the time the crime was committed the LaGrand brothers were 19 and 20 years old respectively and had experienced – as far as I know – a youth that must be described as problematic to say the least. Finally, I should also like to mention that the LaGrand brothers would be the first German nationals – at least during this century – to be executed in the United States of America. Hence clemency would be most welcome from the angle of justice policy as well. I would be very much obliged to you, Attorney General, if you could follow up my request and if you would make a sustained approach to Ms. Hull to obtain clemency for the LaGrand brothers.

With my cordial thanks in advance for your endeavours, I remain,
Yours sincerely,
(signature)

Annex MG 21

UNITED STATES COURT OF APPEALS (NINTH CIRCUIT), *KARL LAGRAND V. STEWART*, 170 *FEDERAL REPORTER* 1158-1161 (24 FEBRUARY 1999/AMENDED 26 FEBRUARY 1999)

Before: RICHARD S. ARNOLD, FLOYD R. GIBSON, and HANSEN, Circuit Judges.

PER CURIAM.

In this ERISA case, the issue is whether the employee-beneficiary failed to exhaust his administrative remedies by not filing a timely intra-plan appeal. The District Court[1] held the claim barred by failure to exhaust. We affirm.

Plaintiff argues exhaustion would have been futile. But no evidence to support this claim was adduced, and we are unwilling to assume futility. Plaintiff points out that he had already obtained one level of intra-plan review, and that his failure, if any, related only to a second level of intra-plan review. The law does not forbid an intra-plan appellate structure containing two levels.

Affirmed.

Karl Hinze LaGRAND, Petitioner,

v.

Terry STEWART, Director, Arizona Department of Corrections, and Dan Vanelli, Warden, SMU II, Arizona State Prison, Florence, Respondent.

No. 99-70180.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 23, 1999.

Decided Feb. 24, 1999.

Amended Feb. 26, 1999.

After his conviction was affirmed, 152 Ariz. 483, 733 P.2d 1066, and denial of his first federal petition for habeas corpus by the United States District Court for the District of Arizona, John M. Roll, J., was affirmed, 133 F.3d 1253, Arizona death row inmate petitioned for order authorizing him to file second or successive habeas petition. The Court of Appeals held that: (1) petitioner was not required to obtain leave to file successive petition as to claim that was not ripe at time of his first petition, and (2) petitioner was barred from asserting other claims.

Dismissed in part and denied in part.

1. Habeas Corpus ⇒898(2)

Habeas petitioner was not required to obtain leave to file second or successive habeas petition as to his claim that execution by lethal gas under Arizona's protocol was cruel and unusual punishment in violation of the Eighth Amendment, notwithstanding petitioner's prior habeas petition, where that claim was not ripe at time of petitioner's first habeas petition because petitioner had not yet chosen lethal gas as his method of execution. U.S.C.A. Const.Amend. 8; 28 U.S.C.A. § 2244(b)(3).

2. Habeas Corpus ⇒679, 898(2)

A challenge to prior felony convictions that has not yet been pursued, and relief not yet given, does not support a showing of actual innocence that would permit habeas petitioner to file successive petition seeking stay that would permit petitioner to pursue collateral proceeding challenging felony convictions used as aggravating factor in his death sentence. 28 U.S.C.A. § 2244(b)(2)(B).

3. Habeas Corpus ⇒897

Habeas petitioner's claim that state supreme court erred in according a presumption of correctness to trial court's findings on juror's bias was barred, on application to file successive habeas petition, where petitioner raised issue in his first habeas petition but did not appeal district court's denial of that claim. 28 U.S.C.A. § 2244(b)(1).

4. Habeas Corpus ⇒332.1

Habeas petitioner's claim that recent statements by two police officers supported his claim of actual innocence was barred from consideration by district court, where claim had not yet been presented to or decided by the state courts. 28 U.S.C.A. § 2254(b)(1)(A).

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[1] The Hon. Stephen N. Limbaugh, United States District Court for the Eastern and Western Districts of Missouri.

5. **Habeas Corpus 🔑897**

Where habeas petitioner unsuccessfully challenged lethal injection method of execution in his first habeas petition, further pursuit of that claim in successive petition was barred. 28 U.S.C.A. § 2244(b)(1).

6. **Habeas Corpus 🔑894.1**

A claim of incompetency to be executed is not properly the subject of a request for leave to file a second or successive habeas petition. 28 U.S.C.A. § 2244(b)(3).

7. **Habeas Corpus 🔑897**

Habeas petitioner's claim that state violated his rights under the Vienna Convention on Consular Relations of 1963 (VCCR) could not be presented in successive habeas petition, where both his claim that cause existed for his failure to raise claim in state court and his fundamental miscarriage of justice argument were raised and rejected in his previous habeas petition. 28 U.S.C.A. § 2244(b)(1).

Carla G. Ryan, Tucson, Arizona, for the petitioner.

Paul J. McMurdie, Assistant Attorney General, Phoenix, Arizona, for the respondent.

Appeal from the United States District Court for the District of Arizona; John M. Roll, District Judge, Presiding. D.C. No. 92-026-JMR.

Before: HUG, Chief Judge,
PREGERSON, and T.G. NELSON, Circuit Judges.

ORDER

Arizona death row inmate Karl LaGrand has filed a petition, pursuant to 28 U.S.C. § 2244(b)(3), for an order of this court authorizing him to file a second or successive ("SOS") petition for writ of habeas corpus in the district court. For a description of the crime and prior proceedings *see State v. LaGrand*, 153 Ariz. 21, 734 P.2d 563 (1987), and *LaGrand v. Stewart ("LaGrand I")*, 133 F.3d 1253 (9th Cir.), *cert. denied*, — U.S. —, 119 S.Ct. 422, 142 L.Ed.2d 343 (1998).

Section 2244(b)(1) requires the dismissal of claims that were previously presented in a federal habeas petition. Claims that were not previously presented must also be dismissed unless they rely either on a new rule of constitutional law or a showing of actual innocence. *See* 28 U.S.C. § 2244(b)(2); *Martinez-Villareal v. Stewart ("Martinez-Villareal II")*, 118 F.3d 628, 631 (9th Cir.1997), *aff'd*, 523 U.S. 637, 118 S.Ct. 1618, 140 L.Ed.2d 849 (1998).

LaGrand proposes to raise eleven claims in the district court, if authorized to do so. We will address each proposed issue in turn:

1. *Lethal Gas*

[1] LaGrand claims that execution by lethal gas under the Arizona protocol is cruel and unusual punishment in violation of the Eighth Amendment. LaGrand previously raised this claim in his first habeas petition. *See LaGrand I*, 133 F.3d at 1264. We declined to address the issue, holding that until LaGrand affirmatively chose lethal gas as his method of execution, his claim that lethal gas was an unconstitutional method of execution was not ripe. *See id.* LaGrand has now chosen lethal gas as his method of execution. His lethal gas claim is therefore ripe. *See id.*

The question that we must answer here is by what vehicle LaGrand can now raise this claim in federal habeas corpus. Must he obtain leave to file an SOS petition from this court, or may he, instead, raise the issue directly in the district court? We believe the answer to this question is found in *Martinez-Villareal II*, 118 F.3d 628.

In *Martinez-Villareal II*, we recognized an exception to the SOS petition provisions of § 2244(b). There the petitioner claimed he was incompetent to be executed. The district court held that the claim was not ripe, and we agreed in the first appeal. *See Martinez-Villareal v. Lewis ("Martinez-Villareal I")*, 80 F.3d 1301, 1309 (9th Cir.1996). When the case came up on a request for leave to file an SOS petition, we held that such leave was unnecessary, since no meaningful relief could have been given to petitioner until he was actually faced with an execution. *See Martinez-Villareal II*, 118 F.3d at 633. While in that case the district court had dismissed the competency claim as not ripe, and here we held the lethal gas claim to be unripe and refused to hear it, this difference is not material. In both cases, this court held the claim was not ripe for decision at that time.

The exception recognized in *Martinez-Villareal II* results in the petitioner's being able to file what is functionally a first petition as to a previously unripe claim. This is LaGrand's situation as to the lethal gas claim. As in *Martinez-Villareal II*, we dismiss as unnecessary the motion for leave to file a second or successive petition insofar as it relates to LaGrand's claim that lethal gas is an unconstitutional method of execution.[1] LaGrand may raise this claim directly in the district court.

2. *Length of Time on Death Row*

LaGrand claims that it would be cruel and unusual punishment in violation of the Eighth Amendment to execute him after he has resided on death row for over fourteen years, has produced additional mitigation evidence that was not introduced at trial and has shown that he is not a threat to society. Claims that the Eighth Amendment would be violated by the execution of an inmate after many years are called *Lackey* claims, after *Lackey v. Texas*, 514 U.S. 1045, 115 S.Ct. 1421, 131 L.Ed.2d 304 (1995). This circuit has uniformly held that such claims do not come within the terms of § 2244(b)(2) authorizing SOS petitions. *See, e.g., Gerlaugh v. Stewart*, 167 F.3d 1222 (9th Cir.1999); *Ortiz v. Stewart*, 149 F.3d 923, 944 (9th Cir.1998); *Ceja*, 134 F.3d at 1368.

3. *Pecuniary Gain*

LaGrand argues that the dissent in a recent Arizona case, *State v. Greene*, 192 Ariz. 431, 967 P.2d 106 (1998), demonstrates that "evolving standards and devolving jurisprudence" would dictate that the pecuniary gain aggravating circumstances would not today be supported in his case. The *Greene* case analyzes the pecuniary gain factor in a manner entirely consistent with our opinion in *LaGrand I*, 133 F.3d at 1259–61. The case does not support, much less tend to demonstrate, a claim of actual innocence. *See* 28 U.S.C. § 2244(b)(2)(B).

4. *Cruel, Heinous or Depraved*

LaGrand makes a similar argument concerning the aggravating factor that the killing was "especially cruel, heinous or depraved." He asserts that this "evolution" constitutes newly discovered evidence. The case he relies on, *State v. King*, 180 Ariz. 268, 883 P.2d 1024 (1994), does not support an argument that this aggravating factor would not be found to be present in LaGrand's case if it were to be reviewed today. This claim does not in any way tend to show actual innocence. *See* 28 U.S.C. § 2244(b)(2)(B).

5. *Collateral Proceeding*

[2] LaGrand argues that he is entitled to a stay in order to permit him to pursue a collateral proceeding challenging felony convictions used as an aggravating factor in his death sentence. The convictions followed robberies which occurred in 1981. LaGrand says he "will be challenging … the prior convictions…." A challenge not yet pursued, and relief not yet given, does not support a showing of actual innocence. *See* 28 U.S.C. § 2244(b)(2)(B).

6. *Juror Bias*

[3] LaGrand argues that the Arizona Supreme Court erred in according a presumption of correctness to the trial court's findings on a juror's bias. LaGrand raised this

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[1] We recognize that in *Ceja v. Stewart*, 134 F.3d 1368 (9th Cir.1998), we affirmed the district court's holding that a challenge to Arizona's method of execution by lethal *injection* was covered by the AEDPA and that the petitioner had to seek and obtain permission from this court to raise the claim in an SOS petition. *Id.* at 1368. The present case is, however, distinguishable from *Ceja*.

In *Ceja*, the inmate was challenging execution by lethal *injection*. That claim was ripe when Ceja filed his initial habeas petition because he would be executed by lethal *injection* unless he affirmatively chose execution by lethal *gas*. *See* Ariz.Rev.Stat. § 13-704(B). We recognized the ripeness of such a claim in the present case when we addressed the merits of LaGrand's lethal *injection* claim in his first habeas petition. *See LaGrand I*, 133 F.3d at 1264–65.

In contrast, here LaGrand is attempting to challenge execution by lethal *gas*. As we held in *LaGrand I*, this claim was not ripe until LaGrand affirmatively chose this method of execution. He has now made his choice and the claim is only now ripe.

issue in his first habeas petition but did not appeal the district court's denial of the claim to this court. Further pursuit of this claim is therefore barred. *See* 28 U.S.C. § 2244(b)(1).

7. *Newly Discovered Evidence*

[4] LaGrand claims that recent statements by two police officers support a claim of actual innocence. This claim has not yet been presented to or decided by the state courts. The claim is therefore barred from consideration in the district court. *See* 28 U.S.C. § 2254(b)(1)(A).

8. *Denial of a Fair Clemency Hearing*

LaGrand recognizes that his claim of defects in the Arizona clemency process is premature.

9. *Lethal Injection*

[5] LaGrand unsuccessfully challenged lethal injection in *LaGrand I*. *See* 133 F.3d at 1264–65. Further pursuit of this claim is therefore barred. *See* 28 U.S.C. § 2244(b)(1).

10. *LaGrand's Competence to be Executed*

[6] A claim of incompetency to be executed is not properly the subject of a request for leave to file an SOS petition. *See Martinez–Villareal II*, 118 F.3d at 635 n. 8.

11. *Vienna Convention*

[7] LaGrand claims that his rights under the Vienna Convention on Consular Relations of 1963 ("VCCR") were violated by the State.[2] LaGrand raised this claim in his first habeas petition, where we dismissed the claim for failure to exhaust and because LaGrand failed to show either cause excusing his procedural default or actual innocence of the death penalty. *See* 133 F.3d at 1262.

LaGrand has now presented this claim in state court, and the state court has dismissed the claim because it found the claim to be procedurally barred by waiver under Ariz. R.Crim. P. 32.2(a)(3).[3] The claim is now back before us.

Federal habeas review is not available on this claim unless LaGrand can show cause for his default and actual prejudice. *See Correll v. Stewart*, 137 F.3d 1404, 1415 (9th Cir. 1998). LaGrand's argument that cause existed for his failure to raise this claim in state court was raised and rejected in his previous habeas petition. *See* 133 F.3d at 1262. LaGrand's fundamental miscarriage of justice argument was also raised and rejected in his previous habeas petition. *See id.* Having been "presented in a prior application" for federal habeas relief under § 2254, LaGrand's arguments cannot be presented in an SOS petition. *See* 28 U.S.C. § 2244(b)(1).

LaGrand's request for leave to file an SOS petition is DISMISSED as unnecessary as to the claim relating to the use of lethal gas. The request is DENIED as to all other claims. Since we are granting a stay of execution in No. 99-99004, LaGrand's request for a stay of execution in this case is DENIED as moot.

UNITED STATES of America,
Plaintiff–Appellee,

v.

REAL PROPERTY LOCATED AT 25445 VIA DONA CHRISTA, VALENCIA, CALIFORNIA, Defendant,

and

Ramdas P. Gupta, Claimant–Appellant.

No. 95–56352.

United States Court of Appeals,
Ninth Circuit.

March 12, 1999.

Before: REINHARDT,* KOZINSKI, and TROTT, Circuit Judges.

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[2] The court granted petitioner's oral motion to add this claim to his motion seeking authorization to file a second habeas petition.

[3] Rule 32.2(a)(3) provides: "A defendant shall be precluded from [PCR] relief ... based upon any ground ... [t]hat has been waived at trial, on appeal, or in any previous collateral proceeding." Ariz. R.Crim. P. 32.2(a)(3).

* Pursuant to G.O. § 3.2.g, Judge Reinhardt has been drawn as the replacement for Judge Gibson, who has retired from the court.

Annex MG 22

UNITED STATES COURT OF APPEALS (NINTH CIRCUIT), *KARL LAGRAND* V. *STEWART*, 173 *FEDERAL REPORTER* 1144-1150 (24 FEBRUARY 1999)

threat of the death penalty is a powerful incentive to plead regardless of whether the risk of receiving it is perceived to be great or small.").

V.

We conclude that the district court did not err in finding that the ineffective assistance of trial counsel, coupled with the inadequate advice by the trial court, resulted in a guilty plea that was not knowingly and voluntarily entered and that Ivy was thus entitled to habeas relief.

We express our appreciation to appointed counsel for their zealous efforts on Ivy's behalf, both in the district court and on appeal.

The order is affirmed.

Karl Hinze LaGRAND, Petitioner–Appellant,

v.

Terry STEWART, Director, Arizona Department of Corrections, and Dan Vanelli, Warden, SMU II, Arizona State Prison, Florence, Respondents–Appellees.

No. 99-99004.

United States Court of Appeals,
Ninth Circuit.

Submitted Feb. 23, 1999.
Filed Feb. 24, 1999.

After his murder conviction was affirmed, 152 Ariz. 483, 733 P.2d 1066, and denial of his first petition for federal habeas corpus relief was affirmed, 133 F.3d 1253, Arizona death row inmate filed new habeas corpus petition. The United States District Court for the District of Arizona, John M. Roll, J., denied relief. Petitioner appealed. The Court of Appeals, T.G. Nelson, Circuit Judge, held that: (1) petitioner established cause for failing to raise challenge to constitutionality of lethal gas as execution means prior to his first habeas petition; (2) petitioner established prejudice required to excuse procedural default of lethal gas challenge; (3) petitioner's voluntary choice of lethal gas as method of execution of death sentence did not waive his claim that use of lethal gas was unconstitutional; and (4) Arizona method of using lethal gas to execute inmates is unconstitutional.

Affirmed in part, reversed in part, and remanded with instructions.

See also: 170 F.3d 1158.

1. Habeas Corpus ⚿407

Claim that lethal gas was unconstitutional method of execution was not reasonably available to counsel for habeas petitioner during period that counsel pursued direct appeal, given absence of reason to believe, in then-prevailing legal landscape, that any court would be sympathetic to such a claim, and therefore petitioner established cause for his failure to raise claim prior to his first federal habeas corpus petition. U.S.C.A. Const.Amend. 8.

2. Habeas Corpus ⚿409

Habeas petitioner established prejudice required to excuse his procedural default of claim that lethal gas was unconstitutional method of execution, in that petitioner faced execution by allegedly unconstitutional means. U.S.C.A. Const. Amend. 8.

3. Habeas Corpus ⚿409

For purposes of cause and prejudice test for excusing habeas petitioner's procedural default of claim, "prejudice" is defined as actual harm resulting from the claimed constitutional error.

See publication Words and Phrases for other judicial constructions and definitions.

4. Habeas Corpus ⚿401

Habeas petitioner's voluntary choice of lethal gas as method of execution of his death sentence did not waive his claim that use of lethal gas violated Eighth Amendment. U.S.C.A. Const.Amend. 8.

5. Constitutional Law ⇨43(1)

Eighth Amendment protections may not be waived, at least in the area of capital punishment. U.S.C.A. Const. Amend. 8.

6. Criminal Law ⇨1213.8(8)

Arizona method of using lethal gas to execute inmates is unconstitutional. U.S.C.A. Const.Amend. 8.

Carla G. Ryan, Tucson, Arizona, for the petitioner.

Paul J. McMurdie, Assistant Attorney General, Phoenix, Arizona, for the respondents.

Appeal from the United States District Court for the District of Arizona; John M. Roll, District Judge, Presiding. D.C. No. 99-00095-JMR.

Before: HUG, Chief Judge,
PREGERSON, and T.G. NELSON,
Circuit Judges.

ORDER

The Order and Opinion filed on February 24, 1999, is amended as follows:

Replace the last paragraph on page 12, continuing on to page 13, with the following:

A further word concerning the death warrant is in order. The warrant parallels the statute in giving LaGrand a choice of the method of execution.

A.R.S. 13.704B provides:

> B. A defendant who is sentenced to death for an offense committed before November 23, 1992 shall choose either lethal injection or lethal gas at least twenty days before the execution date. If the defendant fails to choose either lethal injection or lethal gas, the penalty of death shall be inflicted by lethal injection.

The petitioner did choose execution by lethal gas twenty days prior to the execution date. The State acknowledged at oral argument that the petitioner could not change his mind. Thus, execution under the existing warrant would require execution by lethal gas. Since we have held the method chosen by LaGrand to be unconstitutional, the death warrant must be reissued in a form that does not require execution by lethal gas.

OPINION

T.G. NELSON, Circuit Judge:

Karl LaGrand, an Arizona death row inmate, appeals the district court's order denying his second petition for writ of habeas corpus. For the reasons which follow, we affirm in part and reverse in part.

I. *Procedural History*

Karl LaGrand and his brother Walter LaGrand were convicted of murder for the 1982 murder of a bank employee in the course of a robbery. For a description of the crime and prior proceedings *see State v. LaGrand*, 153 Ariz. 21, 734 P.2d 563 (1987), and *LaGrand v. Stewart*, 133 F.3d 1253 (9th Cir.), *cert. denied*, — U.S. —, 119 S.Ct. 422, 142 L.Ed.2d 343 (1998).

In the prior case, the district court denied all of LaGrand's claims, and this court affirmed. *See* 133 F.3d at 1257. Following denial of *certiorari* by the Supreme Court, a death warrant was issued, scheduling the execution for February 24, 1999. LaGrand thereafter filed a number of different proceedings in the courts of Arizona. The Arizona state courts have denied all relief to LaGrand. LaGrand then filed a request with this court for leave to file a second or successive habeas corpus petition, pursuant to 28 U.S.C. § 2244(b). That request was denied by a separate order in case number 99-70180, issued concurrently with this opinion. LaGrand also filed a separate habeas petition in district court which is the subject of this opinion.

II. *Issues Other Than Lethal Gas*

The issues raised in the second petition in the district court paralleled the issues sought to be presented in the second or successive ("SOS") petition. The district court decided that it had jurisdiction of the claim relating to the use of lethal gas as a method of execution and denied the claim on the merits. As to all the other claims, the district court stated either that it lacked jurisdiction in the absence of an order from this court authorizing the filing of an SOS petition, or that for other reasons the claims were not cognizable. The district court's decision on all the claims except the lethal gas claim is affirmed, for the reasons given in our order entered in case number 99-70180.

III. *Lethal Gas*

A. *California*

The use of lethal gas as a method of execution has been extensively litigated in California since 1992. In that year, plaintiff David Fierro and others filed a class action pursuant to 42 U.S.C. § 1983 challenging lethal gas as an unconstitutional method of execution. One of the plaintiffs was Robert Alton Harris, whose execution was scheduled to take place four days after the case was filed. Harris' participation resulted in a number of stays of execution, all subsequently vacated by the Supreme Court. *See Fierro v. Gomez ("Fierro II")*, 77 F.3d 301, 302–03 (9th Cir.1996), for the history of the litigation.

The *Fierro* case was ultimately tried before the district court in 1993. After the trial, the court entered an order holding that lethal gas, as employed pursuant to the "protocol" governing its use in California, constituted a cruel and unusual method of execution and enjoined its use as a means of execution. 865 F.Supp. 1387 (N.D.Cal.1994).

On appeal by the State, we affirmed. *See Fierro II*, 77 F.3d at 301. After our decision, the California statute governing executions was amended to provide lethal injection as the primary method of execution.[1] Inmates sentenced to death before the effective date of the act were given the option of choosing lethal gas as the method of execution in their cases. *See* Cal.Penal Code § 3604(b). The Supreme Court vacated our decision in *Fierro II* and remanded with instructions to reconsider our decision in light of the statutory change. *Gomez v. Fierro*, 519 U.S. 918, 117 S.Ct. 285, 136 L.Ed.2d 204 (1996).

In response to the Supreme Court's order, we held that the case was not ripe for decision, since no inmate in California was then subject to execution by lethal gas, at least in the absence of an affirmative choice by an inmate to have lethal gas used in his or her execution. *Fierro v. Terhune ("Fierro III")*, 147 F.3d 1158, 1160 (9th Cir.1998). We remanded to the district court with instructions to vacate its judgment, giving the district court the authority to reinstate its judgment when presented with a ripe claim. *Id.*

B. *Arizona*

The Arizona experience somewhat parallels that of California. The use of lethal gas was the only authorized method of execution from the 1930s until 1992. The first case challenging the use of lethal gas in Arizona was the 1934 case of *Hernandez v. State*, 43 Ariz. 424, 32 P.2d 18 (1934). The Arizona Supreme Court upheld the constitutionality of the use of lethal gas in that case, as it did again in 1987 in *State v. Williams*, 166 Ariz. 132, 800 P.2d 1240 (1987). In the latter case, it noted that Williams' claim had "been uniformly rejected on the federal level." *Id.*, 800 P.2d at 1250.

The Arizona legislature amended the statute in 1992 to make lethal injection the designated method of execution, with those inmates who were sentenced to death prior to the amendment having the option of choosing lethal gas as the method of execution to be used in his or her case. Ariz. Rev.Stat. § 13-704(B).

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[1] This was the second amendment. An earlier amendment had added lethal injection as an alternate method of execution. *See Fierro II* at 303.

C. *Karl LaGrand's Claim*

Karl LaGrand committed the crimes of which he was convicted in 1982. He was sentenced to death in 1984, and his direct appeal was concluded in 1987. The first post-conviction relief proceedings were completed in Arizona Superior Court in 1989. The Arizona Supreme Court denied review, as did the United States Supreme Court. *See LaGrand v. Arizona*, 501 U.S. 1259, 111 S.Ct. 2911, 115 L.Ed.2d 1074 (1991).

At no time in the direct appeal or the first PCR petition did LaGrand argue the unconstitutionality of the use of lethal gas as a method of execution. The claim was raised for the first time in the habeas corpus petition filed in 1992, and amended in 1993. The district court rejected the claim as unexhausted, and this court held the claim was not ripe for decision. *See* 133 F.3d at 1264.

1. *Procedural Default*

LaGrand recently presented his lethal gas claim to the Arizona Superior Court, which rejected it as waived. LaGrand argues here that since our previous decision was that the claim was not ripe, it can now be heard because it is now admittedly ripe. LaGrand's argument fails to account for the procedural default declared by the state court. The state court's decision appears sound as a matter of state law. There was no ripeness impediment to LaGrand's presentation of the lethal gas claim at any time during his state court efforts in the 1980s. At that time, lethal gas was the *only* method of execution authorized for use in Arizona. The fact that the claim is now ripe for decision in this court is no answer to the procedural default declared by the state courts.

When LaGrand presented this claim to the district court in the present habeas petition, it rejected the claim on the basis that it was procedurally barred, and that LaGrand had not shown cause and prejudice to excuse the procedural default. This is the only place where we disagree with the district court's analysis.

2. *Cause and Prejudice*

[1] As the district court said, cause exists if the petitioner can show that "some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." *Coleman v. Thompson*, 501 U.S. 722, 753, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). As the district court also noted, such objective factors can "include interference by officials which makes compliance with the state's procedural rule impractical, a showing that the factual or legal basis for a claim was not reasonably available to counsel, and constitutionally ineffective assistance of counsel." District Court Order at 11 (citing *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)).

In 1984 and the years following, LaGrand's counsel was facing a statutory scheme which was upheld in 1934 in *Hernandez*, and in 1987 in *Williams*. Moreover, no reported case anywhere had held lethal gas to be unconstitutional and there was no reason to believe that any court would hold to the contrary.

The State characterizes LaGrand's position as one of futility, and points to cases which hold that the futility of presenting an objection at trial cannot be cause for failing to make the objection. The futility doctrine as an excuse for not presenting a claim to the state court has met with disfavor in the Supreme Court and here. *See Engle v. Isaac*, 456 U.S. 107, 130, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *Noltie v. Peterson*, 9 F.3d 802, 805 (9th Cir.1993). But we believe the portion of *Engle v. Isaac* quoted by the district court sets out the point in the analysis where we diverge from the district court: "If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be un-sympathetic to the claim." 456 U.S. at 130, 102 S.Ct. 1558.

As pointed out above, there was no reason to believe that any court, anywhere, would be sympathetic to the claim that lethal gas was an unconstitutional method of execution. According to the information given to us by the parties, there was no available factual information concerning the painful nature of lethal gas execution, until the 1992 execution of Don Harding in Arizona, and the contemporaneous California executions relied on by the district court in *Fierro*. This is clearly a claim for which the factual or legal basis was not reasonably available at the time that LaGrand pursued his direct appeal in state court. *See Murray,* 477 U.S. at 488, 106 S.Ct. 2639.

The State's argument-that LaGrand should have raised this plainly futile issue on direct appeal-is a reversal of the legitimate argument we often see in response to a claim of ineffective assistance of counsel, that a lawyer need not raise every conceivable claim in order to do an adequate job. As the Court said in *Jones v. Barnes,* 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983):

> There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review.... A brief that raises every colorable issue runs the risk of burying good arguments-those that, in the words of the great advocate John W. Davis, "go for the jugular,"-in a verbal mound made up of strong and weak contentions.

Id. at 752-53, 103 S.Ct. 3308 (quoting Davis, The Argument of an Appeal, 26 ABAJ 895, 897 (1940)).

In a legal landscape which was worse than bleak, the claim that lethal gas was unconstitutional was not reasonably available to LaGrand's counsel in the 1980s. Therefore, he has shown cause for not raising this claim prior to his first habeas petition.

[2, 3] The question of prejudice is easily resolved. LaGrand is now faced with execution by an allegedly unconstitutional means. This surely qualifies as prejudice, defined as actual harm resulting from the claimed constitutional error. *See Magby v. Wawrzaszek,* 741 F.2d 240, 244 (9th Cir.1984).

IV. *Waiver*

[4, 5] Finally, the State argues that LaGrand's voluntary choice of lethal gas as a method of execution constitutes a waiver of his claim that the use of lethal gas is unconstitutional. This argument is foreclosed by the law of the circuit that Eighth Amendment protections may not be waived, at least in the area of capital punishment. We said in *Campbell v. Wood,* 18 F.3d 662 (9th Cir.1994) (en banc):

> [This court has] rejected the argument that the government may cloak unconstitutional punishments in the mantle of "choice."

Id. at 680 (citing *Dear Wing Jung v. United States,* 312 F.2d 73, 75-76 (9th Cir. 1962)).

LaGrand has not waived his ability to challenge the constitutionality of lethal gas as a method of execution.

V. *Fierro as Applied to LaGrand*

[6] LaGrand argues, and the State concedes, that the Arizona method of using lethal gas to execute inmates is substantially similar to that used in California.

The *Fierro* district court found, following an eight day bench trial:

> Inmates who are put to death in the gas chamber at San Quentin do not become immediately unconscious upon the first breath of lethal gas. An inmate proba-

> bly remains conscious anywhere from 15 seconds to one minute, and there is a substantial likelihood that consciousness, or a waxing and waning of consciousness, persists for several additional minutes. During this time, inmates suffer intense, visceral pain, primarily as a result of lack of oxygen to the cells. The experience of "air hunger" is akin to the experience of a major heart attack, or to being held under water. Other possible effects of the cyanide gas include tetany, an exquisitely painful contraction of the muscles, and painful build-up of lactic acid and adrenaline. Cyanide-induced cellular suffocation causes anxiety, panic, terror, and pain.

77 F.3d at 308 (quoting *Fierro v. Gomez*, 865 F.Supp. 1387, 1404 (N.D.Cal.1994)).

Even though the district court's decision was vacated pursuant to our order, *see* 147 F.3d 1158, no court has ever said the district court was wrong. In our own review of the district court decision, we said:

> In short, we hold that the district court's extensive factual findings concerning the level of pain suffered by an inmate during execution by lethal gas are not clearly erroneous. The district court's findings of extreme pain, the length of time this extreme pain lasts, and the substantial risk that inmates will suffer this extreme pain for several minutes require the conclusion that execution by lethal gas is cruel and unusual. Accordingly, we conclude that execution by lethal gas under the California protocol is unconstitutionally cruel and unusual and violates the Eighth and Fourteenth Amendments.

77 F.3d at 308–09.

Counsel for the State has candidly admitted that if the question of Arizona's use of lethal gas went to trial, the record would be no different than it was in *Fierro*. There appears to be no reason to put the parties to the ritual of creating a new record in this case to parallel *Fierro*. We already know what conclusion is compelled by that record.

A further word concerning the death warrant is in order. The warrant parallels the statute in giving LaGrand a choice of the method of execution.

A.R.S. 13.704B provides:

> B. A defendant who is sentenced to death for an offense committed before November 23, 1992 shall choose either lethal injection or lethal gas at least twenty days before the execution date. If the defendant fails to choose either lethal injection or lethal gas, the penalty of death shall be inflicted by lethal injection.

The petitioner did choose execution by lethal gas twenty days prior to the execution date. The State acknowledged at oral argument that the petitioner could not change his mind. Thus, execution under the existing warrant would require execution by lethal gas. Since we have held the method chosen by LaGrand to be unconstitutional, the death warrant must be reissued in a form that does not require execution by lethal gas.

IT IS HEREBY ORDERED that the state respondents, their agents, servants and employees be, and hereby are, restrained and enjoined from executing Karl Hinze LaGrand pursuant to the existing death warrant, and are further temporarily restrained and enjoined from executing Karl Hinze LaGrand, or anyone similarly situated, by means of lethal gas. This order shall be effective immediately, and shall remain in effect until the district court has entered a permanent injunction.

The decision of the district court is AFFIRMED in part and REVERSED in part. The case is REMANDED to the district court with instructions to enter a permanent injunction consistent with this opinion.

The motion for stay of execution is GRANTED to the extent it is encompassed in the above order.

Yousef SAMAN; Mohammed Alfaorr; Estate of Butres Samaan; Majodoleen Samaan; Maher Samaan; Mageda Samaan; Magid Samaan; Roufai Samaan; Josefine Saman; Saman Saman; Martes Saman, Plaintiffs–Appellees,

v.

Daniel ROBBINS; Shauna Clark; City of San Bernardino, Defendants,

and

Michael Blechinger; Mitchal Kimball, Defendants–Appellants.

Yousef Saman; Estate of Butres Samaan; Majcdoleen Samaan; Maher Samaan; Mageda Samaan; Magid Samaan; Roufai Samaan; Josefine Saman; Saman Saman; Martes Samaan, Plaintiffs,

and

Mohammed Alfaorr, Plaintiff–Appellee–Cross–Appellant,

v.

Daniel Robbins; City of San Bernardino; Norine Miller; Valeria Popeludlam; Mitchal Kimball; Thomas Minor; Michael Maudsley; Ralph Hernandez; Jack Reilly; Esther Estrada; William Holcomb; Shauna Clark, Defendants–Appellants–Cross–Appellees.

Yousef Saman; Mohammed Alfaorr; Estate of Butres Samaan; Majodoleen Samaan; Maher Samaan; Mageda Samaan; Magid Samaan; Roufai Samaan; Josefine Saman; Saman Saman; Martes Samaan, Plaintiffs–Appellees,

v.

Daniel Robbins; Shauna Clark; William Holcomb; Esther Estrada; Jack Reilly; Ralph Hernandez, et al., Defendants,

and

Mitchal Kimball; City of San Bernardino; Defendants–Appellants.

Yousef Saman; Mohammed Alfaorr; Estate of Butres Samaan; Majodoleen Samaan; Maher Samaan; Mageda Samaan; Magid Samaan; Roufai Samaan; Josefine Saman; Saman Saman; Martes Samaan, Plaintiffs–Appellants,

v.

Daniel Robbins; Dale Blackwell; Mitchal Kimball, Defendants–Appellees.

Nos. 96–55672, 97–56683, 97–56684, 97–55724 and 97–55789.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Jan. 4, 1999.

Decided March 23, 1999.

Following fatal shooting of shopkeeper by police officer and arrest of another individual, action was brought against police officers and others under § 1983 and state law. Following summary judgment except as to excessive force claims against four officers, and trial on those claims, the United States District Court for the Central District of California, Richard A. Paez, J., entered judgment as a matter of law in favor of one officer, entered judgment

Annex MG 23

SUPREME COURT OF THE UNITED STATES,
STEWART V. KARL LAGRAND
(24 FEBRUARY 1999)

SUPREME COURT OF THE UNITED STATES

No. A–706 (98–1368)

TERRY STEWART, DIRECTOR, ARIZONA
DEPARTMENT OF CORRECTIONS, ET AL.
v. KARL HINZE LAGRAND

ON APPLICATION TO VACATE STAY OF EXECUTION

[February 24, 1999]

The application to vacate stay of execution of sentence of death presented to JUSTICE O'CONNOR and by her referred to the Court is granted.

Justice Stevens, dissenting.

The State has filed a petition for certiorari in No. 98-1368 raising the following four questions:

1. Has the Ninth Circuit opinion holding that execution by lethal gas constitutes cruel and unusual punishment under the Eighth Amendment, created a conflict among the circuits requiring this Court to resolve the constitutionality of Arizona's method of execution?

2. Does an inmate who chooses to be executed by lethal gas, rather than the available constitutional method of lethal injection, waive his right to complain that lethal gas is unconstitutional?

3. Whether an inmate who failed to timely raise an argument about the unconstitutionality of lethal gas in state court has shown cause by claiming that it would have been futile for his appellate lawyer to raise the claim even though lethal gas was the only method of execution at the time the inmate was sentenced? Whether the inmate can show cause for his proce-

dural default by claiming that factual information about lethal gas was unavailable even though numerous executions by lethal gas had occurred over the previous five decades?

4. Whether application of a ruling declaring lethal gas an unconstitutional method of execution is a new rule being applied on collateral review in derogation of *Teague* v. *Lane*, 489 U. S. 288 (1989)?

In my opinion, all four of these questions presented in the State's petition for certiorari merit this Court's attention. I would, therefore, grant that petition and allow the stay to remain in place. Otherwise, the case may become moot.

Justice Ginsburg would deny the application to vacate stay of execution.

Annex MG 24

ARIZONA SUPERIOR COURT, PIMA COUNTY, *STATE OF ARIZONA* V. *WALTER LAGRAND* (23 FEBRUARY 1999)

14

FILED
PATRICIA A. NOLAND
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BY [illegible]OLLAND, DEPUTY

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. CLARK MUNGER CASE NO. **CR-07426**

COURT REPORTER: NONE DATE: February 23, 1999

RECEIVED

STATE OF ARIZONA

VS.

WALTER LAGRAND

MINUTE ENTRY

In Chambers Ruling on Defendant's 2d Petition for Post-conviction Relief Filed February 16, 1999.

The Court, having reviewed the petition for post-conviction relief and supporting memoranda and exhibits, the response, reply, and records in this case, makes the following findings of fact and conclusions of law:

Preliminarily, the Court denies the Defendant's Motion to Strike the State's Response.

1. Pursuant to Rule 32.6(c), Ariz. R. Crim. P., the Court initially identifies all claims that are procedurally precluded under this Rule. The following claims are therefore precluded under Arizona law:

   a. The claim that Defendant's rights under the Vienna Convention were violated (Defendant's argument "C") is precluded under Rule 32.2(a)(3).

   b. The claim that the aggravating factor of pecuniary gain was not proven (Defendant's argument "D") is precluded under Rule 32.2(a)(2).

Mary Bailey/MM
Deputy Clerk

c. The claim that the aggravating factor of especially cruel, heinous or depraved was not proven (Defendant's argument "E") is precluded under Rule 32.2(a)(2).

d. The claim that the Arizona Supreme Court erred regarding the finding of juror bias (Defendant's argument "H" [sic][Petition, pg. 36]) is precluded under Rule 32.2(a)(2).

2. The remaining issues present no material issue of fact or law which would entitle the Defendant to relief under Arizona law and no purpose would be served by any further proceedings. The issues are as follows:

a. The claim that Defendant is being denied a fair clemency process (Defendant's argument "G") is premature. In the alternative, it is precluded under A.R.S. § 13-4232(A).

b. The claim that the use of lethal injection is cruel and unusual punishment (Defendant's argument "H") is contrary to Arizona law. State v. Hinchey, 181 Ariz. 307, 890 P.2d 602 (1995).

c. The claim that Defendant is incompetent to be executed (Defendant's argument "I") is not before the correct Court. The matter of competency must be raised before the Superior Court of Pinal County, the county in which Defendant is now located. A.R.S. § 13-4022(A). In the alternative, it is precluded under A.R.S. § 13-4232(A)(1).

d. The claim that the use of lethal gas is cruel and unusual punishment (Defendant's argument "A") is moot because Defendant has the choice of execution by lethal injection.

Mary Bailey/MM
Deputy Clerk

State v. Ross, 180 Ariz. 598. 886 P.2d 1354 (1994)(claim against lethal gas is moot because defendant had option of execution by lethal injection). In the alternative, it is precluded under A.R.S. § 13-4232(A)(3).

e. The claim that it would be cruel and unusual punishment to execute Defendant after he has resided on death row for more than 14 years (Defendant's argument "B") is contrary to Arizona law. State v. Schackart, 190 Ariz. 238, 947 P.2d 315 (1997).

For the foregoing reasons,

IT IS ORDERED that the petition for post-conviction relief be dismissed.

HON. CLARK MUNGER

cc: Hon. Clark Munger
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Annex MG 25

ARIZONA SUPERIOR COURT, PIMA COUNTY, MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITIONER'S PETITION FOR POST-CONVICTION RELIEF

(16 FEBRUARY 1999)

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STATE BAR NO. 004316
PIMA COUNTY COMPUTER NO. 7104

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PIMA

THE STATE OF ARIZONA, Respondent, vs. WALTER B. LaGRAND, Petitioner.	No. CR-07426 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITIONER'S PETITION FOR POST-CONVICTION RELIEF Assigned to: Judge Munger

Petitioner, WALTER B. LAGRAND, by and through his attorney undersigned, hereby submits this Memorandum of Points and Authorities in support of his Petition for Post-Conviction Relief, which was filed on February 2, 1999. By order of this Court, Petitioner has been given until February 16, 1999 to file this Memorandum in support of his Petition.

RESPECTFULLY SUBMITTED this [illegible] day of February, 1999.

LAW OFFICE OF BRUCE A. BURKE

By: ____________________
Bruce A. Burke
Attorney for Petitioner

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS AND PROCEDURAL HISTORY

Petitioner, Walter LaGrand, is a 36 year old German citizen and is the second of three illegitimate children born to three different fathers while his mother, Emma G. LaGrand, lived in Augsburg, Germany. [Exhibit 1] Emma's oldest child is a daughter, Patricia, born on July 21, 1960. Her third child, is Karl, Petitioner's half-brother and co-defendant, who was born on October 10, 1963. Walter is a German citizen who was born out of the union of his mother, a German, and a black American GI. [Exhibit 1] Both his sister Patricia and his brother Karl are white. Id.

Petitioner had a terrible childhood, the product of a troubled and detached mother. Emma and her mother moved to Germany when Emma was very young to avoid the trauma of the war that was raging in Czechoslovakia. Emma's father was a soldier in World War II and died. When Emma, her twelve siblings and her mother arrived in Germany in 1945, they were placed in a "relocation" camp. Three of Emma's siblings starved to death during this time. After being allowed to leave the camp, Emma, her mother, and the other surviving children moved to Augsburg. In Augsburg Emma worked as a waitress and sometimes as an employee in a factory.

After Emma's mother became ill and could no longer watch or handle the children, Emma placed the two boys (Petitioner and Karl) in a Catholic orphanage. It was two years before she finally made a visit to see them. She found them covered with lice. Karl has stated that he and Walter were punished by being deprived of food and blankets, and that they were frequently beaten by the nuns. They were frequently cold. [Exhibit 1]

Emma and Mr. LaGrand later decided to get married and take the boys back. Emma continued to work full time and she could not be home with them. After she got married her family "ex-communicated" her because she married an "outsider". (He was an American, and an African-American as well.) After they married, Mr. LaGrand adopted all three children.

In 1967, when Petitioner was about five years old, Mr. LaGrand and his German wife and children were transferred back to the United States. Soon thereafter, Mr. LaGrand was ordered to report for duty in Vietnam. He served either one or two tours of duty, being wounded twice. Upon his return he drank heavily, could not sleep, and had terrible nightmares. He also became very violent. He began to womanize and stay away from the home. When he was at the home, he would easily get mad because the kids would "run around." According to Emma, he would often beat the children – usually with a belt. Emma recalls one of the boy's backs being ripped open on one occasion. The boys began to run away to avoid the beatings (usually sleeping on park benches). Id.

Emma and Mr. LaGrand continued to have marital trouble after he was transferred to Sierra Vista, Arizona. When Mr. LaGrand was transferred back to Germany the family remained in Arizona. (Apparently both Mr. and Mrs. LaGrand had been having affairs during their separation, which created a very unstable home environment for the boys.)

During this time, both Petitioner and Karl started to act out like abandoned children do. One time, Petitioner and Karl, while out by themselves, began stirring up trouble and an officer from a nearby military base, who saw them became concerned and he offered to help, by taking them into his house. He knew that they needed a father figure and some discipline. Emma readily accepted that offer and summarily sent the boys away again.

Mr. LaGrand returned from Germany in October of 1973. Troubles immediately began between him and Emma and he left the residence after a violent argument. Mr. LaGrand then readily accepted another tour in Germany.

Petitioner and Karl were returned home from their "informal placement" with the officer and began to have difficulties once again with Emma who was again abandoned. In December of 1973 Emma decided that the whole "family" would go back to Germany to join her husband-the children's adoptive father. When they arrived in Germany, unannounced, they found Mr. LaGrand living with another woman and with children from that relationship. Finally, almost six months later, after the boys had been tossed back and forth, Emma left with her children and returned to Arizona, blaming the boys.

Mr. LaGrand filed and obtained a divorce. He attempted to claim he had never adopted them. This was devastating to the children. Even though it was proven that he had adopted them, Emma and the children never saw him again. He never paid child support and never had contact with them.

In 1975 Petitioner was sent to a juvenile institution, a Vision Quest group home in Cochise County. [Exhibit 1] He was then barely a teenager. He had severe depression and was from time to time suicidal. Though he was in need of psychiatric care and had a substance abuse problem, no meaningful care was provided. Despite a blonde Afro and pale skin, Petitioner was placed in an all Black group home to learn of his African American heritage. The other children, not surprisingly, teased him and called him "white boy."

[Exhibit 1]

Quite understandably, Walter's behavior did not improve while he was at Vision Quest. He had additional referrals to juvenile court, he smoked pot, and he ran away. Eventually he was remanded to the Department of Corrections Juvenile Facility at Adobe Mountain. Following this, he was returned to Vision Quest. Though he was recommended for psychiatric care, none was provided, and he remained at Vision Quest until he was 18 years old, with house parents who were eventually fired because they were using drugs while on duty. [Exhibit 1] Walter later went to prison and then was placed in a half-way house. In September of 1981 Walter was released. Walter was then reunited with Karl.

In October 1981 the LaGrands robbed a Safeway and a Fry's. Walter had a prior and was not initially released on bail. Walter's counsel re-urged a second motion to modify conditions of release on Walter's behalf. Walter's conditions of release were modified and he was released January 5, 1982.

Then, at 7:50 a.m. on January 7, 1982, in Marana, Arizona, Petitioner and Karl were in the parking lot between the local Valley National Bank and a fast food restaurant. They approached the manager of the restaurant and asked when the restaurant opened. He told them 9:00 a.m. and proceeded on his way.

Just before 8:00 a.m., Dawn Lopez arrived for work at the bank. She noticed three vehicles in the parking lot. She recognized the pickup truck belonging to the bank manager, Ken Hartsock, but not the others. Since Lopez was early she did not stop, but rather drove around for three or four minutes. Upon returning she saw Karl and Hartsock by the bank

onfessed that he had confronted Hartsock with a toy pistol that the brothers had brought with them in order to get into the bank.

Lopez started to enter the bank. Petitioner, seeing Lopez, got out of his vehicle and approached Lopez. They spoke briefly and Walter escorted her into the bank through the unlocked doors.

As Lopez entered she saw Hartsock and Karl at the vault. She heard Karl tell Hartsock to open the bank vault. Hartsock said he could not open it without the head teller's key. Petitioner and Karl were obviously frustrated at this point and in their agitated state (and since they were befuddled as to what to do) they ordered both Hartsock and Lopez to sit and face the wall in Hartsock's office. Hartsock and Lopez's hands were then bound with electrical tape.

The telephone rang. Karl held the phone to Lopez's ear. The caller was a bank employee, Wilma Rogers. Rogers testified that upon arriving for work, she saw unfamiliar vehicles in the lot and became suspicious. She then proceeded to a nearby grocery store and made the phone call. The stress at the scene immediately intensified. The call made Petitioner and Karl even more agitated and nervous. During their brief conversation, Rogers told Lopez that her lights were on and that if she did not go out and turn them off, she would call the police. Lopez's hands were unbound and she was free to go to her car. Lopez returned to the bank.

The phone rang again, and again Lopez was allowed to speak to the caller. By this time, Karl was even more stressed. Petitioner indicated that they should leave and they decided to abort the attempted robbery. According to both Walter and Karl, Walter left Karl with Hartsock and Lopez in order to get the getaway car started. Back in the bank, Hartsock intentionally kicked Karl in the leg. This was the event that set Karl off. In his disassociative state, Karl reacted without any forethought or premeditation. In this hysterical moment, Hartsock was stabbed with a letter opener that happened to be on Hartsock's desk. In the meantime, Lopez broke the tape on her wrists and she turned around. The testimony of Dawn Lopez differed materially from the testimony of Walter LaGrand. She testified she saw Hartsock struggling with both Karl and Walter. She saw Hartsock fall and she started to scream. Lopez testified that she was also stabbed with the letter opener, and she said that Walter stabbed her, a contention which Walter denied.[1]

Petitioner and Karl left. Lopez locked the bank door behind them and called the police. As she was on the phone the paramedics arrived. It could not have been more than 20 minutes from the time Hartsock was stabbed to when the police arrived. Lopez, while on the phone with the dispatcher, kept saying she was sure Hartsock was dead. The autopsy revealed that he had sustained twenty-four (24) stab wounds of which any six could have been fatal. [Exhibit 2]

After they left the bank, Walter testified that Karl was so hysterical that he had to lie down in the back seat of the car. Karl was hyperventilating and totally out of control. Karl and Walter were arrested later that same day. Karl gave two separate confessions.[2] [Exhibit 4] One was given at the DPS office, during which Karl expressed genuine remorse at what had happened. He also became hysterical as he described how it happened. Karl fainted and was taken to St. Mary's Hospital, where he gave his second confession, still mortified and expressing sorrow, remorse and disbelief. In both statements, Karl stated that he acted alone and that Petitioner was out of the room when the stabbings occurred.

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[1] At trial, Petitioner called Dr. Loftus, an expert on eyewitness testimony, who provided plausible explanations as to why Lopez might have misperceived and therefore misdescribed these events.

[2] They were both held to be inadmissible and involuntary by the trial court.

The trial started on January 31, 1984. Petitioner and his brother were tried together. On February 14, 1984, Petitioner was convicted of murder in the first degree; attempted murder in the first degree; attempted armed robbery; and two counts of kidnapping.

The trial court pursuant to the death penalty statute held an aggravation\mitigation hearing on March 15, 1984, one month after the conviction. The trial court found three (3) aggravators: 1) Petitioner had previously been convicted of a felony using force; 2) Petitioner had participated in the offense in the expectation of pecuniary gain; and 3) that the crime was committed in an especially cruel, heinous or depraved manner.

At no time was Petitioner advised of his Vienna Convention rights or advised that the consulate would assist him in his fight for his life, because he is a German citizen [Exhibit 1 and 4]. The State was aware of his citizenship.

Petitioner was sentenced to death for the first degree murder conviction, 28 years for the attempted first degree murder conviction, 20 years for the attempted armed robbery conviction and 28 years for each of the kidnapping convictions. The non-capital sentences were to run consecutive to the death sentence but concurrent to each other.

The case was automatically appealed to the Arizona Supreme Court. On January 30, 1987 the Arizona Supreme Court affirmed both the convictions and sentences of both of the brothers. *State v. (Karl) LaGrand*, 152 Ariz. 483, 733 P. 2d 1066 (1987); *State v. (Walter) LaGrand*, 153 Ariz. 21, 734 P. 2d 563 (1987).

Two of the Justices dissented from the finding of pecuniary gain as an aggravating factor. In a footnote, Justice Gordon stated:

> I disagree that pecuniary desires necessarily caused Hartsock's murder merely because the LaGrands intended to rob the bank. Nor do I agree that Hartsock's murder furthered any pecuniary desires. Hartsock's death provided to LaGrands neither access to nor escape with money or other valuables. Finally, I do not believe the evidence proves beyond a reasonable doubt that pecuniary desires motivated Hartsock's murder. My review of the record suggests that it is equally, if not more, likely that the panic caused by Hartsock's kick to Petitioner's leg, rather than pecuniary desires, motivated the LaGrands to kill Hartsock.

Id. fn.5

After the Arizona Supreme Court affirmed his conviction and sentence, Petitioner filed a Petition for Post-conviction Relief before the trial court. This Petition was denied and the Arizona Supreme Court declined review.

A Petition for Writ of Habeas Corpus was filed in the Federal District Court of Arizona and stay was granted. The District Court denied relief. The matter was then appealed to the Ninth Circuit Court of Appeals. On January 16, 1998 the Ninth Circuit Court of Appeals published its opinion affirming the convictions and sentences. *LaGrand v. Stewart*, 133 F.3d 1253 (9th Cir.1998). However, Circuit Judge Pregerson dissented because he believed that Petitioner's challenge to Arizona's lethal gas statute was ripe for review and should have been addressed by the Ninth Circuit. The majority held that an individual could not challenge a method of execution unless that method had been selected as the method to be used. In Arizona, a condemned inmate is not given the opportunity to make such a decision until an execution date has been set.

The Ninth Circuit also upheld the pecuniary gain factor stating that "the attempted robbery permeated the entire conduct of the defendant." The Court stated that the defendants may have "reacted irrationally to the failure or inability of the victim to open the safe but the murder was neither accidental nor unexpected."

It further held that it was "undisputed" that the State failed to comply with the Vienna Convention requirements. However, the Ninth Circuit held that this issue was precluded because it had not been raised in the state courts. Therefore, this issue was not decided on the merits. But no one said it could not be raised again.

The Ninth Circuit opinion was appealed to the United States Supreme Court. On December 7, 1998 the United States Supreme Court refused to accept this case for review. Thereafter, on January 12, 1999 the Arizona Supreme Court scheduled the execution date of Petitioner for March 3, 1999.

II. THE ISSUES RAISED ARE NOT PRECLUDED

Arizona law provides that under certain circumstances successive petitions will be considered on their merits. *Rule 32.2 (b)* of the *Arizona Rules of Criminal Procedure* provides that if a successive petition sets forth the reasons for not raising the claim in the previous petition or in a timely manner then the claims will be considered on their merits and not summarily dismissed. *A.R.S. § 13-4232 (B).*

The following claims should be considered at this time because they were not ripe prior to an execution date being set:

(1) Execution by gas is unconstitutional.

(2) Executing Petitioner 16 years after the crime and 14 years after being sentenced to death is unconstitutional.

(3) The clemency process in Arizona is unconstitutional.

(4) Petitioner's competency.

The *LaGrand v. Stewart*, 133 F.3d 1253 (1998) Ninth Circuit opinion made it clear that a challenge to a gas execution could not be made until the condemned "elected" to be executed by gas. Therefore, since an inmate has no input until an execution date is set, this challenge could not have been made prior to this time. Walter has recently checked the box on the DOC form indicating execution by lethal gas. [Exhibit 5] He supplemented this form with an explanation of his decision. Id.

Petitioner's challenge to the constitutionality of being executed after residing for over 14 years on death row also was not ripe until now. [Exhibit 20] See, *LaGrand v. Stewart*, 133 F. 3d 1253 (9th Cir. 1998); *Stewart v. Martinez – Villarreal*, 523 U.S. 637, 118 S.Ct. 1618 (1998); *Ceja v. Stewart*, 115 Ariz. 413, 415, 565 P.2d 1274 (1998) (Fletcher, J., dissenting) (defendant's claim that execution following incarceration on death row for 23 years would serve no penological purpose and would violate the *Eighth Amendment* was not barred under successor petition provisions of AEDPA; its gate keeping provisions did not apply, and the claim became ripe for review by the District Court upon filing of Death Warrant.)[3]

Petitioner's challenge to the clemency process also could not have been made prior to the time that he was actually participating in the process; therefore, this is the first time he could have made such a challenge. [Exhibit 6]

And finally, since he was not about to be executed, his competency to be executed could not have previously been challenged, and if it had, he should be allowed to re-challeng it because of the changed circumstances.

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[3] The majority opinion holds to the contrary.

A. The following claims should be considered because of "evolving standards" an changes in the law.

- (1) Vienna Convention
- (2) Challenge to execution by gas
- (3) Challenge to length of time on death row
- (4) Challenge to pecuniary gain
- (5) Challenge to cruel, heinous or depraved
- (6) Challenge to the juror bias

The United States Supreme Court determines whether a particular sentence i excessive or disproportionate for certain crimes or individuals. Standards for evaluating a disproportionate sentence change as times and perceptions change. *See Thompson v. Oklahoma*, 487 U.S. 815, 834 (1988) (plurality opinion) ("punishment should be directly related to the personal culpability of the criminal defendant") [cite omitted]; *Tison v. Arizona*, 481 U.S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.").

In analyzing the *Eighth Amendment's* protections, the United States Supreme Court has examined society's views of the challenged type of punishment as expressed by what the Court finds to be objective evidence of community values, including legislative judgments, sentences imposed by juries, public opinion, and international practices. *Stanford v. Kentucky*, 492 U.S. 815 (1988) (plurality opinion) (majority of states permitting capital punishment for

16-year old sufficient to show absence of national consensus against the practice); *Tison* *supra* at 154 (several states authorize death penalty for felony murder regardless of intent to kill "powerfully suggests" society does not reject death penalty in those circumstances). *Ford v. Wainwright*, 477 U.S. 399, 408 (1986) (fact that no state legislature permits execution of insane individuals supports holding that execution of insane defendant violates *Eighth Amendment*).

Thus in *Edmund v. Florida*, 458 U.S. 782 (1982), the Court held that the death penalty is unconstitutional for one who "does not himself kill, attempt to kill, or intend that the killing take place or that lethal force will be employed." *Id* at 797. This was further refined in *Tison*, *supra*. The court articulated the "reckless disregard" standard, an intermediate mental state fell short of intent for which the death penalty could permissibly be imposed. *Id.* at 157-58. In *Coker v. Georgia*, the Court held that the death penalty was disproportionate punishment for the crime of raping an adult woman. 433 U.S. 584 (1977).

In every case where the United States Supreme Court has applied the *Eighth Amendment* or found that a particular state action did not fall within the *Eighth Amendment*, the Court has used an evolutionary analysis. The Court found that capital cases mandate that the death penalty be imposed using "evolving standards of decency that mark the progress of a maturing society."[4] The basic premise of the death penalty and the *Eighth Amendment* is that the state may not put to death a person if that decision is made using standards which have changed, evolved, or matured.

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[4] *Gregg v. Georgia*, 428 U.S. 153, 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

The following cases have expressly changed the law or the standards that courts hav applied since this case originated, affecting these claims and making it necessary for thi court to evaluate these claims at this time. This is evident from the Arizona Supreme Court' change in the application of certain aggravators and the expansion of mitigation.

The law surrounding the Vienna Convention did not become more than a "novel" idea until about 1992, which is when Petitioner first raised his claim. The District Court and the Ninth Circuit found this claim to be precluded because Petitioner did not raise it in the state court; however, the Courts did not find it would be futile to raise this issue and no court has considered the merits.

Constitutional violations unknown during the time that the first opportunity to raise them should be allowed when they become known. *Lambright v. Lewis*, 902 F. Supp. 1547 (D. Ariz.1996)

The Arizona courts have allowed other inmates to raise issues in successive pleadings if the arguments were not futile. See *Gerlaugh v. Lewis*, 898 F. Supp. 1388 (D. Ariz.1995); *Lambright v. Lewis*, 932 F. Supp. 1547 (D. Ariz. 1996)

The Arizona Supreme Court has said that it does not know if an issue would be "futile," *Morales v. Gonzales*, 192 Ariz. 131, 962 P.2d 205 (1998). Therefore, since the Arizona rules are not applied consistently, Petitioner should be allowed to litigate these issues in the state court:

Execution: *Fierro v. Gomez* 117 S.Ct. 285 (1996); *Fierro v. Terhone* 147 F.3d 1158 (9th Cir. 1998)

Length of time:	*Ceja v. Stewart*, 134 F.3d 1368 (9th Cir. 1998)
Pecuniary Gain:	*State v. Greene*, 280 Ariz. Adv. Rpt.20, 967 P.2d 106 (1998)
Cruel, Heinous or Depraved:	*State v. King*, 180 Ariz. 268, 883 P.2d 1024 (1994)
Juror Bias:	*Green v. Georgia*, 519 U.S. 145, 117 S.Ct. 578 (1996)

B. Newly discovered evidence.

The mitigation evidence from Germany, which supports Petitioner's challenge to the violation of his international rights, his challenge to pecuniary gain and his request to have this court re-evaluate his death sentence because of the length of time which has passed since his sentencing.

Petitioner never waived these challenges in his earlier collateral review.

C. Finally , the challenge to lethal injection is raised merely to preserve it for review if it becomes necessary. *Stewart v. Martinez-Villarreal*, 523 U.S. 637. 118 S.Ct. 1618 (1998); *Woratzeck v. Stewart*, 118 F.3d 648 (9th Cir. 1997)

Petitioner has checked the box on the DOC form indicating execution by gas. [Exhibit 5] This is not a free and voluntary choice, but one that is being made because it is the only way to challenge the constitutionality of the gas chamber as cruel and unusual punishment. Id. This decision is based on the fact that execution by lethal gas was the sentence imposed by the trial court and upheld by the Arizona Supreme Court. The Ninth Circuit Court of Appeals informed Petitioner that selecting lethal gas was the only way in which the constitutionality of this type of execution could be litigated. *LaGrand v. Stewart*, 133 F.3d 1253 (9th Cir., 1998); See also, *Poland v. Stewart*, 117 F.3d 1094, 1101 (9th Cir., 1997). It must be noted that if this issue is decided in favor of Petitioner, Petitioner does not want t waive his right to file a similar challenge to execution by lethal injection. Petitioner believes lethal injection is unconstitutional as well and he believes he would be able to support hi challenge with evidence if he was allowed an evidentiary hearing.

III. LEGAL ARGUMENTS

A. The Imposition Of Death By Lethal Gas In Arizona Is Cruel And Unusual Punishment.

In Arizona, when executing with gas, sodium cyanide pellets, wrapped in cheesecloth are lowered into a mixture of sulfuric acid and distilled water. The chemical reaction produces hydrogen cyanide gas, the same gas — known by its trade name Zyklon B — was used by the Nazis to exterminate over a million men and women between 1941 and 1945 at the concentration camp Auschwitz-Berkenau.

Throughout the killing process, which can take over ten minutes, the condemned person experiences excruciating pain. Initially, the pain will be similar to that of simultaneously suffering a stroke and a heart attack. The pain spreads throughout the inmate's body as its hunger for oxygen produces uncontrollable and violent reactions. The body reflexively produces a massive amount of adrenaline, which causes a "pounding and rapid heartbeat, an increase in blood pressure, dilation of air passages, and a tightening of sphincters." A condemned person will eventually suffocate, his heart will stop, and his brain will cease to function, but not before the State has subjected him to this excruciating and inhumane pain.

1. Eyewitness accounts of a lethal gas execution in Arizona confirm the unnecessary and wanton infliction of pain.

The affidavit by James J. Belanger, a licensed attorney in Arizona, attests to the horrific death that Don Eugene Harding suffered on April 6, 1992 in the Arizona State gas chamber [Exhibit 7]

Harding's execution was the first lethal gas execution in the State of Arizona since 1963 and because of the agonizing, torturous and dehumanizing manner by which Harding died, the State legislature adopted the alternative method of execution by lethal injection. Today, if the crime occurred before November 23, 1992, it is up to the condemned to determine by which method he must die.[5]

Two of the witnesses to Harding's death, Carla McClain and Donna Hamm, described that Harding immediately began to "moan and groan very loudly, loudly enough" for the witnesses to "hear through the extremely thick metal walls" of the gas chamber. [Exhibit 8] It was like a "low guttural sound of shear torment". James Belanger described the execution of Harding: "His face was red and contorted as if he was attempting to fight through tremendous pain." [Exhibit 7] For endless minutes, Harding gasped and choked as his body strained for oxygen. Id.

The agony that Harding experienced was obvious to all who witnessed the execution: Harding's "skin turned bright, bright red from his face all the way through his chest and that's the capillaries of his circulatory system bursting inside his chest and blood filling his chest cavity there and he was almost a kind of a purple and he strained." Statement by Carla

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[5] Another cause of undue emotional stress. *A.R.S. § 13-704 (b)(2)*. Also, in Arizona, there was a requirement that a physician be present. However, *A.R.S. § 13-705* now deletes the requirement that a physician "shall" be requested to attend an execution. Therefore, in Arizona, it is no longer required that a physician be present at the time that an execution occurs.

McClain. [Exhibit 8] Another witness stated that "at this point, Don's body started convulsin violently and his arms strained against the straps."[Exhibit 7] "His face and body turned deep red and the veins in his temple and neck began to bulge until I thought they migh explode." Id.

After several minutes, Harding's head dropped to his chest, and witnesses hoped and prayed that his suffering was over. Id. But just as relief came over the witnesses, Harding raised his head, twitching and gasping. Harding's suffering did not end for several minutes. Most, if not all of the witnesses to Harding's execution, including then Arizona's Attorney General, Grant Woods, agreed that the State must switch to another form of execution to avoid the "terrible" lethal gas method. [Exhibit 9]

2. Other Eye Witness Accounts Of Lethal Gas Executions

There are numerous accounts of the cruel and hideous nature of such executions[6]. The process of dying by lethal gas described in these accounts is painful, prolonged and brutal. These accounts are describing the same type of lethal gas process as is used in Arizona[7].

Shortly after Harding's execution, Robert Harris was gassed in California. Harris' death also confirmed the horrors of executing by lethal gas, and resulted in California finding lethal gas to be unconstitutional. *Fierro, II, supra*[3].

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[6] The attached Exhibits 10 and 11 are other execution eye witness descriptions and expert scientific opinions about the cruelty of death by lethal gas. Included are also historical witness statements from death by gas in the Nazi concentrations camps.

[7] The protocols that were adopted by California are identical to Arizona's protocols. [Exhibit 12]

The two most recent accounts of execution by gas are from North Carolina. *Lawson v. Dixon*, 25 F. 3d 1040 (4th Cir. 1994); *State v. Sanderson*, 346 N.C. 669, 488 S.E. 2d 133 (1997). In July, 1994, at the execution of David Lawson, he screamed as soon as the fumes reached his head. [Exhibit 13] He continued screaming "I am human!" until the very end. Id. He attempted to lift himself out of the chair and the wide leather strap holding down his legs was broken by the force of his involuntary reaction to bring his knee to his chest. Id. In January, 1998, at the execution of Rick Lee Sanderson, even though he was attempting to shorten the painful period it takes to die by lethal gas by inhaling deeply, Sanderson violently convulsed for seven or eight minutes while fluids were coming out of his ears, his nose and his mouth. [Exhibit 14] His hands and arms strained mightily against the straps, his head thrashed violently. Id.

3. Execution by lethal gas violates contemporary standards of decency.

As shown above, death by lethal gas is brutal, agonizing and cruel. It is also unusual given the infrequency of its use and the virtually unanimous abandonment of it as a method of execution. *Thompson v. Oklahoma*, 487 U.S. 815, 822, n.7 (1988) (plurality opinion).

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[3] *Fierro* was vacated by the United States Supreme Court in *Gomez v. Fierro*, 117 S.Ct. 285 (1996). However, the Ninth Circuit opinion was not merely vacated by the United States Supreme Court, but was remanded back to the United States Court of Appeals for further consideration in light of the fact that the California Legislature amended its penal code section 3604 to be similar to the Arizona Statute. Then the Ninth held that the issue would not be ripe for review until a condemned inmate actually "chose" that method. *Fierro v. Terhune*, 147 F. 3d 1158 (9th Cir. 1998) See also, *LaGrand v. Stewart*, 133 F. 3d 1253 (9th Cir. 1998); *Poland v. Stewart* 117 F.3d 1094, 1101 (9th Cir. 1997).

Only four states provide for gas as a method of execution – Arizona, Maryland Mississippi and Missouri.[9] Three states, Arizona, California and North Carolina, have executed individuals with gas[10] since the 1976 Supreme Court decision in *Gregg v. Georgia* 428 U.S. 153 (1976). All other states that used the gas chamber in the past have abandoned it in favor of what are considered to be more humane methods.

As indicated above, California recent lethal gas executions have recently been held to be violative of the *Eighth Amendment. Fierro, II supra.* The District Court in that case had the benefit of an eight-day trial, in which the defendant was able to offer evidence similar to that presented before this Court. [Exhibit 10] The Ninth Circuit, in affirming the District Court's decision, determined that execution by lethal gas under California's protocol was unconstitutional. Id.

The United States Supreme Court has found that the most reliable indication of a national consensus is the pattern of the laws enacted by the states. *Stanford v. Kentucky*, 439 U.S. 361, 373 (1989). The pattern of laws as to the methods of execution establishes that the gas chamber has been rejected because it is an unnecessarily cruel and inhumane method of execution.

4. Legal Analysis

The United States Supreme Court has condemned as violative of the *Eighth*

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[9] In 1998, after a particularly horrendous execution by lethal gas, North Carolina abolished execution by lethal gas. [Exhibit 14]

[10] Don Harding-Arizona; Robert Harris- California; and David Lawson and Rick Sanderson in North Carolina.

Amendment all punishments that inflict torture or lingering death, *In re: Kemmler*, 136 U.S. 436, 447 (1890), and punishments that "involve the unnecessary and wanton infliction of pain." *Hudson v. McMillan*, 503 U.S. 1, 112 S.Ct. 995 (1992). Moreover, "No court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives." *Furman* at 430 (dissenting opinion of Powell, J., Joined by Burger, C.J., Blackman, J. and Rehnquist, J.)

The United States Supreme Court has not confined the prohibition embodied in the *Eighth Amendment* to barbarous methods that were generally outlawed in the 18th century, but instead has interpreted the amendment in a flexible and dynamic manner. *Stanford v. Kentucky*, 492 U.S. 153, 171 (1976). (opinion of Stewart, Powell, and Stevens, JJ.)

> The Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity and decency...,' against which we must evaluate penal measures. Thus we have held repugnant to the *Eighth Amendment* punishments which are incompatible with 'the evolving standards of decency that mark the progress of a maturing society.'

Estelle v. Gamble, 429 U.S. 102 (1976) (citations omitted). *Robinson v. California*, 370 U.S. 660 (1962), held that *Eighth Amendment* claims must be evaluated "in the light of contemporary human knowledge." This knowledge establishes that death by lethal gas is lingering and agonizing.

B. It Is a Violation of the *Eighth Amendment* to the *United States Constitution* to Execute Petitioner after Petitioner Has Resided on Death Row for over 14 Years, Has Produced Additional Mitigation That Was Not Introduced at His Trial with No Fault of His Own, and Has Shown He Is Not a Threat to Society.

This crime occurred in 1982. Petitioner was sentenced to death in 1984. He has been on death row for 14 years. The Arizona Supreme Court has held:

> There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time.

Pratt v. Attorney General of Jamaica, [1993] 4 All E.R. 769 (P.C.) (appeal taken from Jamaica); citing *State v. Richmond III*, 180 Ariz. 573, 577, 886 P.2d 1329, 1333 (1994).

During these past 14 years, Petitioner has demonstrated his nonviolent character by living without any major incidents, and, as much as possible on death row, with dignity. [Exhibit 20] Petitioner educated himself and he worked in responsible positions within the prison when it was allowed. Id. He has always been a good worker and the guards often used his services. Id.

The United States Supreme Court has defined the penological justifications for the death penalty. The justifications are twofold: retribution and deterrence. *Gregg v. Georgia*, 428 U. S. 153 (1976). When a proposed execution "ceases realistically to further these purposes. . ., its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes...[and] would be patently excessive and cruel and unusual punishment violations of the Eighth Amendment." *Furman v. Georgia*, 408 U. S. 238, 312--13 (1972) (White, J., concurring).

The ability of the State of Arizona to further the ends of retribution and deterrence has been drastically diminished as a result of the time that has elapsed since his conviction and the gains he has achieved toward self-rehabilitation. At least two United States Supreme

Court Justices have stated that such a claim presents colorable grounds for relief. *Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., joined by Brewer, J., respecting the denial of Certiorari).

The Arizona Supreme Court has also considered this issue. *State v. Richmond III*, 180 Ariz. 573, 886 P.2d 1329 (1994). In *Richmond* the Arizona Supreme Court noted that the capital sentencing law has undergone significant change and therefore:

> [the] resulting legal maze makes it troublesome for us to reaffirm his death sentence in a sensible and non-arbitrary manner. This difficulty, together with evidence that defendant has apparently changed since his crime, persuades us that we should reduce his sentence to life in prison and bring an end to this unfortunate saga.

Id. 180 Ariz. at 578, 886 P.2d at 1334. [Footnote omitted]

As in *Richmond*, an execution in this case, after such a lengthy term of confinement on death row, would constitute cruel and unusual punishment under the *Eighth Amendment* to the *United States Constitution* and *Article 2, § 15* of the *Arizona Constitution*. Such a punishment is tantamount to "torture [and] lingering death", and is "cruel" within the meaning of *In Re Kemmler*, 136 U.S. 436, 447, 10 S.Ct. 930, 933 (1889)[11].

Whether this Petitioner's execution can be justified as serving the required objectives of deterrence and retribution (and Petitioner contends that it cannot) remains to be determined after a full and complete hearing. *Ceja v. Stewart*, 134 F 3d. 1368, 1373 (9th Cir., 1998) (Fletcher, J., dissenting) (if the state is to justify an execution after an inmate has served in excess of 22 years on death row, then it must defend the proposition that the killing will serve as an effective expression of the community's moral outrage, despite the extraordinary length of time that has elapsed since the conviction). It is not enough in seeking to justify the application of the death penalty simply to point to the details of the terrible crime and assert a desire for retribution. *Id.* ("we simply cannot uncritically assume that the interest that legitimized the initial decision will continue to be vital and strong no matter how many decades elapse before [the defendant's] execution is proposed to be carried out. At the very least, after such an extraordinary length of time, the state must demonstrate that its interest in securing stability and harmony to the community through the exaction of this most extreme form of retribution continues to have affect and force.")

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[11] See also Robert Johnson & John L. Carroll, Litigating Death Row Conditions: The Case for Reform, in Prisoners & the Law 8–3 (I. Robbins ed., 1988) (quoting Robert Johnson, Under Sentence of Death: The Psychology of Death Row Confinement, 5 L. & Psychol. Rev. 141 (1979) (providing empirical evidence the psychological pain caused by prolonged confinement on death row); Louis J. West, Psychiatric Reflections on the Death Penalty, reprinted in Capital Punishment in the United States 421–22 (Hugo A. Bedau & Chester Pierce eds., 1976) (same).

Similarly, there is no evidence in this case that killing Petitioner, nearly 17 years after the crime was committed and nearly 15 years after he was sentenced to death, will serve as a deterrent. In fact, as many studies have shown the death penalty may not be a deterrent at all, no matter what the length of the time. Indeed, if there were any deterrent effect after so many years it would be marginal at best. *Ceja, supra*. As Justice Stevens has said, " the additional deterrent affect from an actual execution now on the one hand as compared to seventeen years on death row followed by the prisoner's continued incarceration for life on the other seems minimal." *Lackey v. Texas, supra*. "A penalty with such negligible returns to the state would be patently excessive and cruel and unusual punishment in violation of the Eighth Amendment." *Furman* 408 U.S. at 312. If the State has evidence that there are real and legitimate deterrent interests that would be served by carrying out Petitioner's execution at this date, then it must be required to establish that fact in further hearings.

The length of time that Petitioner has spent on death row should be coupled with his lack of any physical harm to others prior to this offense and his good behavior since his incarceration. The fact that at least two of the Arizona Supreme Court Justices believed that this was an impulsive act and not a premeditated act should also weigh heavily in determining whether at this time the execution of Petitioner would be cruel and unusual punishment.

Additionally, the fact that Petitioner was 19 years old at the time of the crime and is now 36 years old should be persuasive factors in this particular case. Petitioner has suffered the anxiety of impending death for 14 years, during which time he has faced three execution dates (1987, 1992, and 1999). For 14 years Petitioner has lived in solitary confinement, the majority of it in the typical death row cell in Cell Block 6 at the Arizona State Prison in Florence until being relocated, approximately 19 months ago, to the SMU II facility. Cells in SMU II are little more than 7 ft. by 10 ft. windowless concrete boxes with a metal sink and toilet and a concrete slab for a bed. Activity outside that cell is typically limited to three one-to-two hour periods per week in which an inmate may shower or exercise.

Additionally, the preliminary procedures that an inmate is subjected to add to the cruelty of this process. Twenty days before the execution date he must decide which method of execution he desires if the crime occurred before November 23, 1992. He must decide his last meal and what he wishes to do, not only with his remains, but also with his property. [Exhibit 15]

Two weeks prior to the date he is placed on "death watch" where he is video taped twenty-four hours a day and under the watchful eyes of a guard to prevent the condemned from committing suicide. His property is limited and he is not allowed to even wear his jumpsuit. He is kept in his shorts and shirt. He is not allowed to keep even a toothbrush in his cell. [Exhibit 16]

Forty-eight hours before the scheduled execution, Petitioner will be transferred to the death house where he can view the gas chamber and lethal injection rooms from his cell twenty-four hours per day. These "cruel" preliminary procedures, as well as the treatment by staff, only add to the cruelty of keeping Petitioner on death row for 14 years.

C. Petitioner's Rights under the Vienna Convention Were Violated by the State. This Violation Resulted in Petitioner Not Being Able to Convince the Trial Court and the Arizona Supreme Court Not to Find Pecuniary Gain as an Aggravating Factor.

The State authorities violated the Vienna Convention on Consular Relations (hereinafter "VCCR" or the treaty) of 1963, a multilateral international treaty, to which Germany and the United States are signatories[12]. By failing to notify Petitioner upon his arrest, of his right under the treaty to inform his home consulate of his detention the State of Arizona, through its prosecutors and law enforcement officers, violated this treaty. The Ninth Circuit found that the State did violate this treaty. *LaGrand v. Stewart*, 133 F.3d 1253 (9th Cir. 1998). However, the Ninth Circuit held that Petitioner did not present "cause," which would allow the Court to address the merits of a procedurally defaulted claim. (The Ninth Circuit held it was defaulted because it had not been raised in the state courts.)

The Consulate would have rendered vital assistance to Petitioner if properly notified.

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[12] The United States Senate ratified it in 1969.

For instance they could have assisted trial counsel in making decisions about potential defenses and in providing additional mitigation with information from Germany about Petitioner's childhood.[13] This information also would have provided a strong argument to counter the State's contention that this crime was committed in order to receive something of pecuniary gain. This enlightening social history corroborates Petitioner's contention that the murder was an isolated incident and not part of the attempted robbery.

The German consulate, once it was notified in 1992 that Petitioner was a German citizen and proof of such citizenship was provided, immediately provided financial assistance to retain a lawyer in Germany to investigate Petitioner's childhood. They also helped to explain and confirm Petitioner's mother's terrible odyssey from her home in Czechoslovakia to becoming a "displaced" person residing in a relocation camp in Germany with her 12 children and mother.

The State's failure to follow this international law violated Petitioner's constitutional rights under the *Fifth*, *Sixth* and *Fourteenth Amendments* to the *United States Constitution* by interfering with his right to counsel, his right to put on a defense and his right to a fair proceeding.

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[13] This mitigation could have been obtained if Germany had been timely notified. As indicated above, Petitioner was in an orphanage during the formative years of his life. The German Government could have provided counsel with records, witnesses and other information to substantiate the abuse suffered by Petitioner. This is especially true in this case where the orphanage was destroyed. (Petitioner was told that the records were also destroyed.) Most recently, through working with the German Government, Petitioner has found out that some of the records may exist. This is an example of how the German Government could have helped at the onset.

By violating the VCCR the State effectively blocked Petitioner's ability to gather its exculpatory and mitigating evidence. *Crane v. Kentucky*, 476 U.S. 683, 690-691 (1986). The type of information that would have been gathered is the type of information that should be presented in every capital case. *Eddings v. Oklahoma*, 455 U.S. 104, 117-118 (1982); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978). Additionally, Petitioner contends that he is innocent of the death penalty. This mitigation, if presented, would have undermined the State's argument that the murder was for pecuniary gain because it would have established Karl's propensity to be impulsive, to lose control of his behavior under stress and to show his non-violent nature. This is very critical in this particular case because two of the Arizona Supreme Court justices dissented on this very point. With this additional information the pecuniary gain aggravator would not have been found.

D. The Pecuniary Gain Aggravator Is Not Supported Today in this Case Because of Evolving Standards and Devolving Jurisprudence

1. The Pecuniary Gain Aggravator in Arizona

In Arizona, one of the most vulnerable criminal defendants is the one where the pecuniary gain aggravator, *A.R.S. § 13-703(F)(1)-(10)*[14] is used to impose the death penalty. The history of the pecuniary gain aggravator (F)(5) is one of devolution and now does **not** reflect the evolving state of Arizona's death penalty. Petitioner's death sentence would not be supported by the (F)(5) aggravator today. *See*, *State v. Greene*, 280 Ariz. Adv. Rpt. 20, 967 P.2d 106 (1998).

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[14] Petitioner was sentenced under former *A.R.S. § 13-454 (E)(5)* which was renumbered to its current designation, *A.R.S. § 13-703 (F)(5)* .

In 1980, the Arizona Supreme Court began to bring murders with an element of robbery into the reach of the (F)(5) aggravator. In *State v. Clark*, 26 Ariz. 428, 616, P.2d 888 (1980), and *State v. Madsen*, 125 Ariz. 346, 609 P.2d 1046 (1980), the Arizona Supreme Court began to clarify the statutory phrase, "expectation of the receipt of anything of pecuniary value." *A.R.S. § 13-454 (E)(5).*[15] *Clark* held that a "financial motivation" for a murder brought the act within the statute.

In 1983 Justice Gordon and Justice Feldman further sought to narrow the *Clark* definition in their concurrence in *State v. Harding*, 137 Ariz. 278, 670 P.2d 383 (1983) *cert. denied*, 465 U.S. 1013.

In *State v. (Walter) LaGrand*, 153 Ariz. 21, 734 P.2d 563 (1987), the Arizona Supreme Court added another element: "[w]hen the defendant comes to rob, the defendant expects pecuniary gain and this desire infects all other conduct of the defendant." 153 Ariz. at 35.

Since *LaGrand* it appears that a murder must be part of a carefully conceived and meticulously prepared plan. In *State v. Spears*, 184 Ariz. 277, 908 P.2d 1062 (1996), *cert. denied*, 136 L.Ed. 2d 308 (1996). The defendant was the victim's boyfriend. Relying on this, he devised a plan to take her money and vehicle. *Id.* at 282,. The victim took a leave of absence from work, apparently believing she was taking a trip with the defendant. *Id.* During this "trip," she obtained substantial cash advances, purchased things for him, and signed over her vehicle title. *Id.* Her body was found in the desert with a gunshot wound to the back of the head. *Id.* at 283.

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[15] *A.R.S. § 13-454 (E)(5)* was renumbered to its current designation, *A.R.S. § 13-703 (F)(5).*

In *State v. White*, 168 Ariz. 500, 503-04, 815 P.2d 869, 872-73 (1991) the defendant and his girlfriend conspired to kill her husband to obtain life insurance proceeds. At a predetermined time, the defendant drove to the victim's house and, using a potato-silencer on his gun, shot and killed him. *Id.* The defendant and his girlfriend later discussed collecting the insurance money. In *State v. Willoughby*, 181 Ariz. 530, 533-34, 892 P.2d 1319, 1322-23 (1995), the defendant convinced his wife to take out large insurance policies naming him as the beneficiary. After numerous meetings, he and his girlfriend agreed upon an elaborate and detailed murder plan that they later followed. *Id.* at 534,. After killing his wife the defendant filed insurance claims.

In *State v. McKinney*, 185 Ariz. 567, 584, 917 P.2d 1214 (1996), the Arizona Supreme Court found that the deaths were committed in the course of an ongoing burglary spree, and that the possibility of murder was previously discussed and recognized as being a fully acceptable contingency. *Id.* at 584. The Arizona Supreme Court also distinguished the McKinney facts with a spree from "a convenience store robbery gone bad." *Id.*. Thus, the robbery of a convenience store, in which there is an unexpected death, would not have the requisite factual predicates for the F(5) aggravator. This attempted refinement is an indication that the Arizona Supreme Court recognizes the evolving nature of the F(5) aggravator in today's social environment.

Recently in *State v. Greene*, 280 Ariz. Adv. Rpt. 20, 967 P.2d 106 (1998), the Arizona Supreme Court affirmed another set of facts as fitting the (F)(5) aggravator. In this case a university professor was murdered by a defendant who simply crossed the victim's path while the defendant was stoned, broke and desperate. *Id.* However, in *Greene*, Justice Zlaket dissents from the majority's decision to find the (F)(5) aggravator. Justice Zlaket states:

> Put differently, constitutionally permissible aggravators must "reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant*, 462 U.S. at 877, 103 S.Ct. at 2742 (1983), quoted in *Romano v. Oklahoma*, 512 U.S. 1, 7, (1994).

Id. Justice Zlaket also suggests that the subjectivity present in Arizona's sentencing scheme has a fragile constitutional underpinning. *Id.* Therefore, this aggravator has devolved into such subjectivity that it no longer comports with the larger constitutional reality of the "evolving standards of decency that mark the progress of a maturing society." Even in 1987, in the Arizona Supreme Court's decision in Petitioner's case, Justices Feldman and Gordon recognized the problem with applying the F(5) aggravator to the circumstances of a robbery gone bad.[16] The aggravator has devolved into an "all encompassing facts aggravator" which will, *per se*, make a robbery gone bad, death eligible.

2. Weight and Proportionality and the F(5) Aggravator

The other evolutionary component in applying the F(5) aggravator today is in weighing it against the mitigation and in an understanding of the important role of proportionality analysis. Justice Zlaket's dissent in *Greene* also addresses the changing nature of death penalty law in Arizona. His analysis of the F(5) aggravator as weaker aggravator[17] is a useful and important example of the evolution of the standards and their application to Petitioner's case today.

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[16] *State v.(Walter) LaGrand*, 153 Ariz. at note 5. See page 8, *Supra*

[17] Although Justice Zlaket addresses the F(5) aggravator when it is the sole aggravator, his arguments, are equally applicable to the application of the aggravator when it is not alone.

There is now a recognition that the F(5) aggravator requires a different form of factual analysis than existed in 1984. For example, compare the cases where the Arizona Supreme Court has rejected the F(5) aggravator facts: *State v. Rockwell*, 161 Ariz. 4, 775 P.2d 1069 (1989) (defendant killed an employee at a truck stop during a robbery); *State v. Graham*, 135 Ariz. 209, 660 P.2d 460 (1983) (defendant took a rifle to victim's house intending to rob, and killed the victim when he answered the door); *State v. Wallace, (Wallace I)*, 151 Ariz.362, 368, 728 P.2d 232 (1986) (here the taking of the victim's money and vehicle was incidental to the killing which grew out of a dispute with his girlfriend); *State v. Robinson*, 165 Ariz. 151, 796 P.2d 853 (1990) (where the real motive was revenge and a desire to kidnap and defendant's common law wife); *State v. Styers*, 177 Ariz. 104, 115, 865 P 2d 765 (1993) (where evidence did reflect that the defendant's accomplice had a financial motive to kill her child or that child's mother agreed to share insurance proceeds with defendant.)

Justice Zlaket also suggests that the weight of the aggravator should now play a role in the death calculation. He actually admits that this is a recent phenomenon in response to the realities of the death penalty. *State v. Greene* 280 Ariz. Adv. Rpt 20 967 P.2d 106 (1998). This is a new analysis, *Greene, supra.*[18] Justice Zlaket considers the varying weight analysis to be so subjective that it exposes the "fragile constitutional underpinnings" of capital sentencing. However, despite the recognition of such subjectivity, Justice Zlaket proposes that, like varying degrees of cruelty, heinousness or depravity, there should be varying degrees of pecuniary gain, and thus they should not be given the same weight in the sentencing "calculus".

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[18] *State v. Miller*, 186 Ariz. 314, 921 P.2d 1151 (1996); *State v. Barreras*, 181 Ariz. 516, 892 P.2d 852 (1995); *State v. Gulbrandson*, 184 Ariz. 46, 906, P.2d 579 (1995).

In the instant case the whole scene changed from a robbery to a panic driven set of dissociative actions by Karl. There was also testimony from Lopez that the murders were committed while both brothers were in the room. In either scenario, an application of the F(5) aggravator would, in Justice Zlaket's words in *Greene*, be inconsistent and arbitrary.[19]

Justice Zlaket's dissent in *Greene*, and the hesitancy of Justice Feldman and Justice Gordon to affirm the (F)(5) aggravator in the Petitioner's case (*State v. (Walter) LaGrand*, 153 Ariz. at note 5.) illustrates that the (F)(5) aggravator, as applied to Petitioner, should not be affirmed because of the evolution of new standards concerning both the weighing and the application of the (F)(5) aggravator.

E. Under the Facts in this Case and the Evolving Case Law, It Is Apparent That a Finding That the Killing Was Especially Cruel, Heinous or Depraved Is Not Supported Today.

The Arizona Supreme Court has held that all first degree murders are to some extent heinous, cruel or depraved to a degree. *State v. Zaragoza*, 135 Ariz. 63, 69, 659 P.2d 22 (1983); *State v. Bernard-Smith*, 146 Ariz. 491, 503, 707 P.2d 289 (1985). If this is the case, then this aggravator is not intended to apply to all murders. *State v. Gretzler III*, 135 Ariz. 42, 51, 659 P.2d 1 (1983). By definition the murder must be **especially** heinous, cruel or depraved. *State v. Lujan*, 124 Ariz 365, 372, 604 P.2d 629 (1979).

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[19] "It is sad , but true, that the tragic and reprehensible killing of Professor Johnson is not much different from other 'robbery gone awry' murders that come to us. ...I am persuaded that had this court not so ill-advisedly elected to abandon proportionality reviews in capital cases, [citing *State v. Salazar*, 173 Ariz. 399, 417, 844 P. 2d 566 (1992)], the inconsistency and arbitrariness of this death penalty would instantly become obvious." *Greene*.

1. This crime was not especially cruel.[30]

A killing is especially cruel within *A.R.S. §13-703 (F) (6)*, if it involves the infliction of prolonged or excruciating mental, physical, or psychological pain. *State v. James*, 141 Ariz. 141, 685 P.2d 1293 (1984). A defendant must intend or reasonably foresee that the victim will suffer. *State v. McCall*, 139 Ariz. 147, 677 P.2d 920 (1983). The victim in this case was stabbed 24 times because Karl "freaked." He disassociated. He did not intend any harm. His reaction was brought on by the stress of the moment and was aggravated by the kick from the victim. [Exhibit 4]

The testimony was that any one of six of the wounds could have been fatal. [Exhibit 3] Post-mortem injuries are not evidence of cruelty. *State v. Jimenez*, 165 Ariz. 444, 454, 799 P.2d 785 (1990). Therefore, even though the number of wounds is not conclusive of whether there was physical or mental suffering, this testimony establishes the probability of an immediate loss of consciousness. *State v. Soto-Fong*, 187 Ariz. 186, 204, 928 P.2d 610 (1996) (when shots, stabbings, or blows are inflicted in quick succession, one of them rapidly leading to unconsciousness, a finding of cruelty, without any additional supporting evidence, is not appropriate.) In this case, the police arrived within 20 minutes after the aborted robbery. The victim was pronounced dead at the scene. There was no testimony to support a finding that the victim suffered beyond a reasonable doubt. Lopez testified that she thought Hartsock was dead when he fell to the floor. She did not see Hartsock move or hear any sounds from him.

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[30] This issue should be revisited since case law has evolved to provide more guidance over the last 14 years since death was imposed in this case.

2. This crime was not especially heinous or depraved.

The Arizona Supreme Court has set factors to determine whether a murder is especially heinous or depraved: 1) relishing the murder; 2) gratuitous violence; 3) mutilation ; 4) senselessness; and 5) helplessness. *State v. Gretzler III*, 135 Ariz. 42, 659 P.2d 1 (1983)[21]. The Arizona Supreme Court found three of the five of the *Gretzler* factors in this case: gratuitous violence, needless mutilation and a helpless victim.

Neither the trial court nor the Arizona Supreme Court found that Petitioner in any way relished the crime.

The Arizona Supreme Court found that gratuitous violence and mutilation[22] were involved. However, both factors seem to have been based on the number of times the victim was stabbed. The number of stab wounds was not a result of an "evil" or "vile" motive. Instead, they were the result of an uncontrollable reaction by Karl to the high tension and stress of the moment. [Exhibit 2] Petitioner was just 19 years old at the time and neither brother intended to hurt anyone. [Exhibit 4]

The autopsy report and Dr. Byers' testimony does not support "mutilation" – they only support a finding that the stab wounds were "excessive." This excessiveness can only be explained because Karl was out of control and unable to stop himself. There was no disfigurement of the body after the impulsive stabbing, nor was there any "carvings", etc.

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[21] Since Petitioner's sentencing a sixth factor of witness elimination has been added to the factors; however, this was not a factor at the time of sentencing. *State v. Ross*, 180 Ariz. 598, 605, 886 P.2d 1354, 1361 (1994).

[22] The Special verdict filed by the trial court did not find mutilation.

[Exhibit 3]

This leaves only the helplessness of the victim as an aggravator. The Arizona Supreme Court has said that this factor alone is not enough to support the imposition of the death penalty. *State v. Scott*, 177 Ariz. 131, 143-44, 865 P.2d 792, 804-05 (1993).

This crime just does not rise above the norm of first-degree murders. *State v. King*, 180 Ariz. 268, 287, 883 P.2d 1024 (1994)

H. The Arizona Supreme Court Erred in According a Presumption of Correctness to the Trial Court's Findings of Juror Bias.

During jury selection venire-woman Eloise Atwater was challenged by the State and ultimately removed for cause because during voir dire she expressed an opposition to the death penalty. As a result Petitioner's right to an impartial jury was violated. *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 1776-1777 (1968). Although juries in Arizona do not determine punishment, the United States Supreme Court found that the right to an impartial jury could be violated even if jurors did not have control over the sentencing. *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 2524 (1980).

In Arizona a juror may be excused for cause if a juror's views on capital punishment would "prevent" or "substantially impair" the juror's ability to decide the case in accordance with law. *State v. West*, 176 Ariz. 432, 439, 862 P.2d 192 (1993); *State v. Bolton*, 182 Ariz. 290, 301, 896 P.2d 830 (1995). In this case the juror did not succinctly indicate that she would not be able to convict Petitioner because of her views on capital punishment. Rather she indicated that she "would try" to evaluate the evidence "fairly and honestly" and would "make, every good faith effort" to follow the court's instructions. *State v. (Walter) LaGrand*, 153 Ariz. 21, 33, 734 P.2d 563, 577 (1987). Although Walter's counsel was able to rehabilitate Ms. Atwater, the trial court granted the State's challenge for cause and dismissed this juror. The Arizona Supreme Court held that it was not its position to "agree or disagree" with these findings, only to determine whether the findings were supported by the record. *Id* at 33. The Arizona Supreme Court did not review the trial court's finding and instead found the trial court had the advantage of observing and assessing the juror. *Id.* The Arizona Supreme Court determined that "at best, Ms. Atwater's comments were ambiguous and inconsistent" and could not determine whether her views on the death penalty would 'prevent or substantially impair" her performance as a juror but instead merely deferred to the trial court's findings.

The Arizona Supreme Court erred in according a presumption of correctness to the trial court's finding of juror bias. *Greene v. Georgia*, 519 U.S. 145, 117 S.Ct. 578 (1996). The United States Supreme Court in *Greene* found that the "presumption of correctness" standard is not "the standard of review to be applied by state appellate courts reviewing trial courts' rulings on jury selection[23]." 519 U.S. at 579. Even the District Court identified the Arizona's Supreme Court standard of review of this issue in its opinion. The District Court held that [the Arizona Supreme Court] used a **deferential** (fairly supported by the record) standard of review, **citing *Wainwright v. Witt***, as support for this standard." *LaGrand v. Lewis*, 883 F.Supp. 451, 462 (1995) (citations omitted) (emphasis added). Although the District Court may defer to the state court findings the state appellate court may not. *Greene*, *supra*. The

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[23] This is the standard to be.used by federal courts under *28 U.S.C. § 2254 (d)*

Arizona Supreme Court, as the Supreme Court of Georgia, "believed itself bound" by this standard[24] "and in so doing was mistaken." Id. Deference to a state court is not required under *Greene*, therefore the Arizona Supreme Court and the District Court improperly reviewed this issue. *Wainwright, supra.*

G. Petitioner Is Being Denied a Fair Clemency Process in Violation of the *Fifth, Eighth* and *Fourteenth Amendments* to *United States Constitution*.

In a capital case a reprieve hearing is required when an execution is imminent. The power to grant a reprieve or commutation of a death sentence in Arizona is vested in the Governor by *Article 5, Section 5*, of the *Arizona Constitution*. However, the Governor's power to grant a reprieve or commutation of a death sentence is limited by *A.R.S. § 31-402(A)*, which provides that the board must recommend a reprieve first.

The acting board consists of only four members since the fifth position expired in January 1999. No new appointment has been made as far as Petitioner is aware[25]. The last Governor, Mr. Symington, appointed the four sitting members. Those members are: (1) Duane Belcher, Sr. Appointed in 1992. Prior to relocating to Arizona he worked in a probation/parole office in Cleveland, Ohio. Upon relocating to Arizona he became a correctional officer with the Department of Corrections and was "promoted through the ranks"; (2) Kathryn D. Brown. Appointed in 1992. She worked for 14 years with the Arizona Department of Corrections; (3) Howard Jarrett. Appointed in 1995. He worked for 14 years with the Phoenix Police Department, after which he was employed by the Maricopa County Public Defender's Office; and (4) Edward M. Levya, the chairman. Appointed in 1982. He was employed as a Deputy Sheriff in Maricopa County for 22 years. [Exhibit 17]

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[24] As stated above, the Arizona Supreme Court found that it could not agree or disagree with the trial court's findings but only to make sure that the findings had a support in the record. There was no independent review of this issue.

[25] Petitioner is unsure at this time what happens if there is a 2-2 split after the hearing is completed but has informally been told it means "no recommendation."

A.R.S. §31-401 (B) mandates that "[n]o more than **two** members from the same professional discipline shall be members of the board at the same time." Within the current board, all four members have extensive law enforcement backgrounds. Therefore, the current board's composition is in violation of *A.R.S. § 31-401 (B)*.

A.R.S. § 31-402 (C) sets forth the standard that the board should apply when determining whether to recommend commutation with respect to crimes committed on or after January 1, 1994.[26] There is no similar standard with respect to crimes committed prior to that date. (This crime was committed in 1982.)

Nevertheless, the board has promulgated written policies with respect to reprieve and commutation hearings. These policy memoranda fail to contain standards to be applied by the board in determining eligibility for commutation or reprieve in this case. When Karl asked the board and the Governor's Office as to what material would be helpful to them, Karl was told "anything you want to present. [Exhibit 18] No guidance was provided.

The Arizona Constitution provides that a death row inmate gets a right to fair, meaningful clemency proceeding, where he gets a genuine opportunity to produce evidence that justifies some form of clemency. It also provides that the defendant has the right to seek judicial review of the procedures of that proceeding.

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[26] "[A]fter finding by clear and convincing evidence that the sentence imposed is clearly excessive given the nature of the offense and the record of the offender and that there is substantial probability that when released the offender will conform the offender's conduct to the requirements of law", the board may recommend clemency.

It is inconceivable that Petitioner can have even the appearance of a fair clemency proceeding given the Attorney General's conflicting roles as the board's legal advisor and as an advocate, on behalf of the State, in these very proceedings.

A fundamental component of Due Process is a hearing before a disinterested, unbiased and impartial decision-maker. Due Process proscribes decision-making mechanisms that result in rejudgment of a defendant's case. *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). Due process also entitles Petitioner a "neutral and detached" decision-maker. *Morrsey v. Brewer*, 408 U.S. 471, 489 (1972); *Tuney v. Ohio*, 273 U.S. 510, 532 (1927).

Since Arizona has involved the board in this process by requiring them to decide a capital clemency request immediately prior to execution of a death sentence, Arizona has created a life interest of sufficient magnitude and meaning to require comportment with Due Process. Where a state has created a substantive right to life or liberty, federal Due Process must be satisfied. *Hicks v. Oklahoma*, 447 U.S. 343 (1980) (state's failure to afford criminal defendant important state-created rights violated Due Process).

In *Ohio Adult Parole Authority v. Woodward*, 523 U.S. 272, 118 S. Ct. 1244 (1998), the United States Supreme Court addressed the question of whether and to what extent condemned prisoners are entitled to procedural due process safeguards in executive clemency proceedings.

It appears that five of the Justices adhere to the view that some level of due process protection applies to the clemency proceedings. This view was also adopted by the Tenth Circuit in *Duvall v. Keating*, 162 F.3d 1058, (10th Cir. 1998) and by the Ninth Circuit in *Woratzeck v. Arizona Board of Executive Clemency*, 117 F.3d 400 (9th Cir. 1997).

The Ninth Circuit held that since there was no objective or defined criteria limiting the board's discretion, there is no constitutionally protected liberty interest in clemency proceedings. *Id.* at 117 F.3d at 403. The Court nevertheless held that since clemency proceedings play an "integral part" in the state's criminal justice procedure, they must comport with some form of procedural due process. Id.

The minimum requirements of procedural due process are notice and the opportunity for a hearing. *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963 (1974); *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 98 S. Ct. 1554 (1978). Part of the function of notice is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are. *Wolff v. McDonnell*, 418 U.S. at 564. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections". *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950). "The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending hearing". *Memphis, supra* at 14. (Emphasis added). Notice of the issues to be resolved by the adversary process is a fundamental characteristic of fair procedure. *Lankford v. Idaho*, 500 U.S. 110, 115, 111 S. Ct. 1723 (1991). Likewise, time to prepare is also necessary.

In this case, Petitioner's brother Karl has attempted to become informed as to the standard that the board will apply in deciding whether or not to recommend commutation or reprieve and it appears that no such standard exists. Karl has been told that everything could be presented. [Exhibit 18] Thus, it is impossible for Petitioner to know what evidence to present at the clemency hearing or to know what evidence to rebut. It is entirely likely under these circumstances that Petitioner may fail to present evidence that the board would consider relevant in making its decision. Like the petitioner in *Wilson*, Petitioner herein has no way of knowing what to expect and he has therefore not been given adequate notice of the forthcoming clemency proceeding.

H. The Imposition of Death by Using Lethal Injection in Arizona Is Cruel and Unusual Punishment in Violation of the *Eighth Amendment* to the United States Constitution.

Both the scientific evidence and the eyewitness accounts support that the methods employed by the Arizona Department of Corrections[27], in performing executions by lethal injection result in pain to the condemned, and therefore constitute cruel and unusual punishment. [Exhibit 19][28]

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[27] The procedures for executions are outlined in The Arizona Department of Correction Health Services Memo #880, dated February 10, 1993; The Arizona Department of Correction Health Services Memo #705.1 dated March 1, 1993; The Arizona Department of Correction Health Services Memo #500.4 dated January 23, 1992. [Exhibit 19] The Department of Corrections also provides an execution procedure flow chart, which is a sketchy outline of the process. *Id.* Other documents regarding executions by lethal injection are an operation Checklist; a Supply Inventory Checklist and, a death sentence notification checklist. Apparently, The only other written procedures are found in the Arizona Administrative Code for the Department of Corrections Title V, Chapter 1 pp. 14-15 wherein visitation restrictions, the admission of witnesses, conduct of witnesses and crowd control are discussed.

I. Petitioner Cannot Be Executed by the State of Arizona Because He Is Incompetent or Will Be Incompetent. ***A.R.S. §13-4021***

Petitioner's rights as guaranteed by the due process clause of the *Fifth* and *Sixth Amendment* right to counsel, by the *Eighth Amendment* right against cruel and unusual punishment and under the Due Process Clause of the *Fifth* and *Fourteenth Amendments* will be violated if Petitioner is executed while incompetent.[29]

IV. CONCLUSION

Based upon the forgoing it is respectfully requested that this Court accept this second Petition for Review, grant an evidentiary hearing and thereafter an order granting a new trial and/or a new sentencing.

RESPECTFULLY SUBMITTED this 16 day of February, 1999.

LAW OFFICE OF BRUCE A. BURKE

By: ____________________
Bruce A. Burke
Attorney for Petitioner

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[28] If the Court wishes to read more detailed arguments at this time, undersigned will file them under a separate cover. They would include scientific evidence, eyewitness accounts as well as a fully developed legal analysis.

[29] Petitioner will immediately need funds allocated for a mental health expert.

I, Catherine A. Casey, an employee of the Law Office of Bruce A. Burke, certify that on the 1 day of February, 1999, I caused to be mailed, first class, postage prepaid, a copy of the foregoing to:

Walter LaGrand, #42183
A.S.P.C. Eyman
SMU II
P.O. Box 3400
Florence, AZ 85232

Diane Ramsey
Assistant Attorney General for the State of Arizona
1275 W. Washington
Phoenix, AZ 85007-2997

Jonathan Bass
Superior Court Death Penalty Clerk
110 W. Congress
Tucson, AZ 85701

Federal Habeas Unit (information copy only)
c/o Federal Public Defender's Office
97 E. Congress
Tucson, AZ 85701

Also lodged without exhibits, with:

Arizona Supreme Court
Staff Attorney – Donna Hallam

United States District Court
Staff Attorney – Kristine Fox

Ninth Circuit Court of Appeals
Staff Attorney – Jerri Curtis

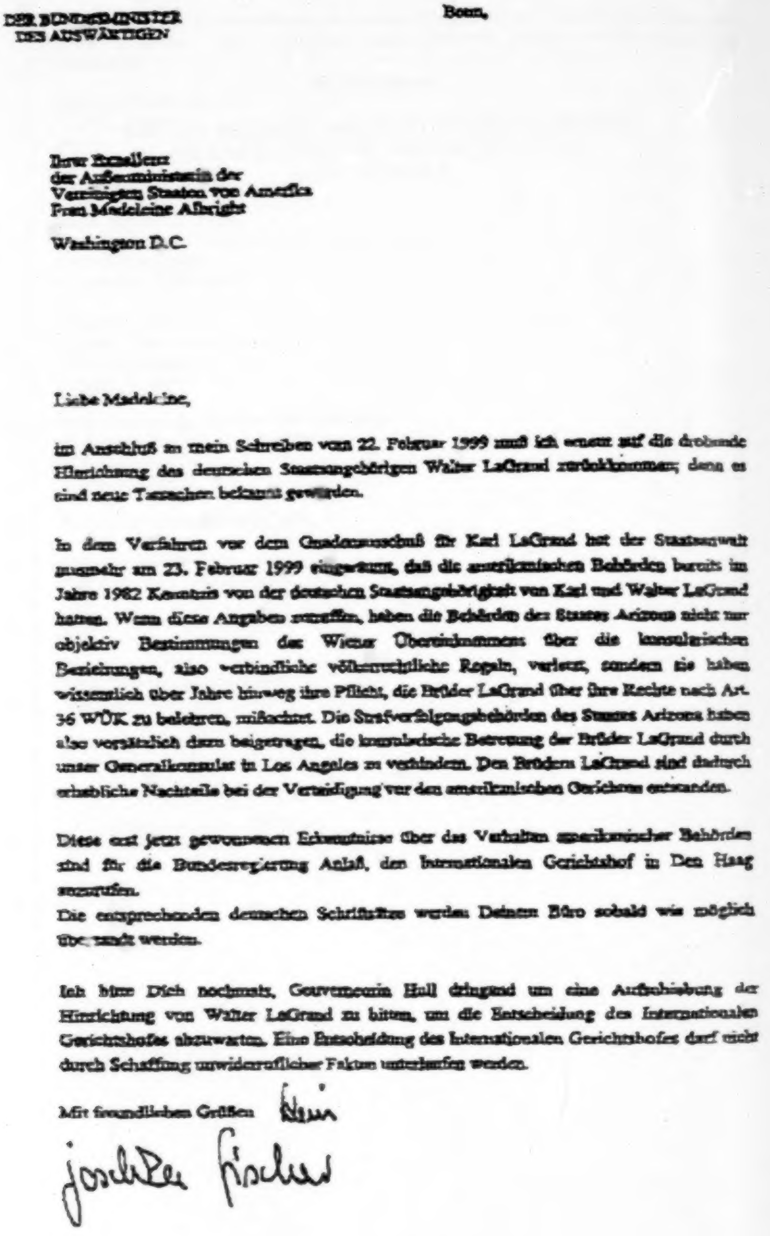
United States Supreme Court
Staff Attorney – Cynthia Rapp

Catherine A. Casey
Catherine A. Casey

Annex MG 26

LETTER OF GERMAN FOREIGN MINISTER FISCHER TO U.S. SECRETARY OF STATE ALBRIGHT

(2 MARCH 1999)



DER BUNDESMINISTER
DES AUSWÄRTIGEN

Bonn,

Ihrer Exzellenz
der Außenministerin der
Vereinigten Staaten von Amerika
Frau Madeleine Albright

Washington D.C.

Liebe Madeleine,

im Anschluß an mein Schreiben vom 22. Februar 1999 muß ich erneut auf die drohende Hinrichtung des deutschen Staatsangehörigen Walter LaGrand zurückkommen; denn es sind neue Tatsachen bekannt geworden.

In dem Verfahren vor dem Gnadenausschuß für Karl LaGrand hat der Staatsanwalt nunmehr am 23. Februar 1999 eingeräumt, daß die amerikanischen Behörden bereits im Jahre 1982 Kenntnis von der deutschen Staatsangehörigkeit von Karl und Walter LaGrand hatten. Wenn diese Angaben zutreffen, haben die Behörden des Staates Arizona nicht nur objektiv Bestimmungen des Wiener Übereinkommens über die konsularischen Beziehungen, also verbindliche völkerrechtliche Regeln, verletzt, sondern sie haben wissentlich über Jahre hinweg ihre Pflicht, die Brüder LaGrand über ihre Rechte nach Art. 36 WÜK zu belehren, mißachtet. Die Strafverfolgungsbehörden des Staates Arizona haben also vorsätzlich dazu beigetragen, die konsularische Betreuung der Brüder LaGrand durch unser Generalkonsulat in Los Angeles zu verhindern. Den Brüdern LaGrand sind dadurch erhebliche Nachteile bei der Verteidigung vor den amerikanischen Gerichten entstanden.

Diese erst jetzt gewonnenen Erkenntnisse über das Verhalten amerikanischer Behörden sind für die Bundesregierung Anlaß, den Internationalen Gerichtshof in Den Haag anzurufen.
Die entsprechenden deutschen Schriftsätze werden Deinem Büro sobald wie möglich übersandt werden.

Ich bitte Dich nochmals, Gouverneurin Hull dringend um eine Aufschiebung der Hinrichtung von Walter LaGrand zu bitten, um die Entscheidung des Internationalen Gerichtshofes abzuwarten. Eine Entscheidung des Internationalen Gerichtshofes darf nicht durch Schaffung unwiderruflicher Fakten unterlaufen werden.

Mit freundlichen Grüßen Dein

Joschka Fischer

Translation

The Federal Minister for Foreign Affairs

Bonn, March 2, 1999

Dear Madeleine:

Following on from my letter of February 22, 1999 I must again return to the subject of the imminent execution of the German national Walter LaGrand, as new facts have come to light.

At the clemency board hearing of the Karl LaGrand case, the district attorney admitted on February 23, 1999 that the American authorities already knew in 1982 that Karl and Walter LaGrand were German nationals. If this information is correct, the authorities of the State of Arizona have not only objectively infringed the provisions of the Vienna Convention on Consular Relations, i.e. binding rules of international law, but have also knowingly and over a period of many years disregarded their duty to inform the LaGrand brothers of their rights under Article 36 VCCR.

The judicial authorities of the State of Arizona have thus intentionally contributed to preventing the LaGrand brothers receiving consular aid from the German Consulate-General in Los Angeles. This has resulted in significant disadvantages to the LaGrand brothers' defense before the American courts.

This information that has only recently emerged concerning the conduct of the American authorities is sufficient reason for the German Government to raise the case with the International Court of Justice in The Hague. Copies of the German application and all relevant material will be forwarded to your office as soon as possible.

I once again ask you to urge Governor Hull for a suspension of Walter LaGrand's execution pending a ruling by the International Court of Justice. A ruling by the Court must not be precluded by the taking of any irreversible action.

Sincerely,
/s/ Joschka Fischer

The Honorable
Madeleine Albright
Secretary of State of the
United States of America

Washington D.C.

Annex MG 27

COMPLAINT OF GERMANY TO THE SUPREME COURT OF THE UNITED STATES AND MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-

THE FEDERAL REPUBLIC OF GERMANY;
JÜRGEN CHROBOG, Ambassador of the Federal Republic of
Germany to the United States; and
WOLFGANG RUDOLPH, Consul General
of the Federal Republic of Germany to the United States,

Plaintiffs,

— v. —

UNITED STATES OF AMERICA and
JANE DEE HULL, Governor of the State of Arizona,

Defendants.

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MAR - 3 1999

OFFICE OF THE CLERK
SUPREME COURT, U.S.

ORIGINAL ACTION

COMPLAINT

This action is brought by Plaintiffs Federal Republic of Germany, Jürgen Chrobog, as Ambassador of the Federal Republic of Germany to the United States, and Wolfgang Rudolph, as Consul General of the Federal Republic of Germany to the United States for the consular district embracing the State of Arizona, to enforce and give effect to a ruling issued by the Vice-President and acting President of the International Court of Justice on March 2, 1999 (the "ICJ Ruling"). The ICJ Ruling is authorized by Article 74(4) of the Rules of Court of the International Court of Justice (the "ICJ"). As authorized by that provision, the ICJ Ruling has called upon the United States to "act in such a way as to enable any Order the Court will make on [Germany's] request for provisional measures to have its appropriate effect." The ICJ Ruling will be violated if the United States does not ensure that a national of Germany, Walter LaGrand, who is **scheduled to be executed today, Wednesday, March 3, 1999, at 5 p.m. eastern standard time**, is not executed pending a decision by the ICJ on Germany's pending request for provisional measures of protection and, eventually, a final resolution of the case brought before the International Court of Justice by Germany against the United States. An injunction is necessary to prevent defendants from violating plaintiffs' rights under the ICJ Ruling.

NATURE OF THE ACTION

1. Plaintiffs bring this action for injunctive relief preventing the Defendants from violating federal law in the form of the ICJ Ruling, the Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. 993, and the Vienna Convention on Consular Relations and its Optional Protocol, 21 U.S.T. 77, 596 U.N.T.S. 261, as well as principles of international comity arising from those instruments, by executing Mr. LaGrand on March 3, 1999.

JURISDICTION

2. This is a case "affecting Ambassadors . . . and Consuls" within the original jurisdiction of the United States Supreme Court under article III, section 2 of the United States Constitution.

THE PARTIES

3. Plaintiff Federal Republic of Germany is a foreign state.

4. Plaintiff Jurgen Chrobog is the Ambassador of the Federal Republic of Germany to the United States. At all relevant times, he had supervisory authority over the consular officers of the Federal Republic of Germany in the United States, including consular officers for the consular district encompassing the State of Arizona.

5. Plaintiff Wolfgang Rudolph is the Consul General of the Federal Republic of Germany to the United States with jurisdiction over the consular district encompassing the State of Arizona.

6. Plaintiffs Jurgen Chrobog and Wolfgang Rudolph bring this action in their capacities as diplomatic and consular officers and on behalf of the Federal Republic of Germany.

7. Defendant Jane Dee Hull is the Governor of the State of Arizona. Pursuant to section 4 of the Constitution of Arizona, the Governor is responsible for "tak[ing] care that the laws be faithfully executed." That responsibility, by virtue of the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, extends to treaties signed by the United States and ratified by the United States Senate.

FACTS

The Charter of the United Nations and the Statute of the International Court of Justice

8. On October 24, 1945, the United States of America became an original member of the United Nations. The Federal Republic of Germany effectively

became a member of the United Nations on September 18, 1973. On June 26, 1945, exercising the exclusive power to conduct foreign relations granted to the President of the United States, an officer of the executive branch of the United States signed the Charter of the United Nations. U.S. Const. art. I, sec. 10; id. art. II, sec. 2. The Senate ratified the U.N. Charter on August 8, 1945. The U.N. Charter is part of the "supreme Law of the Land" under the United States Constitution. U.S. Const. art. VI.

9. Under Article 93(1) of the U.N. Charter, "[a]ll Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice." As a result, the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, is also part of the "supreme Law of the Land" under the United States Constitution. U.S. Const. art. VI.

10. Under Article 94(1) of the Charter, "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."

11. Pursuant to Article 36(6) of the Statute of the International Court of Justice, "[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

12. Pursuant to Article 41 of the Statute of the International Court of Justice, the Court may decide to "indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."

Mr. LaGrand's Death Sentence

13. On September 1, 1982, authorities of the State of Arizona detained two German nationals, Karl and Walter LaGrand (the "LaGrands").

14. Authorities of the State of Arizona were, at the time of the arrest, aware that Karl and Walter LaGrand were German nationals. Only on February 24, 1999, however, did authorities of the State of Arizona admit this knowledge. Because of this delay on the part of Arizona authorities, officials of the Republic of Germany refrained from filing an application and request for provisional measures in the ICJ.

15. Nevertheless, the LaGrands were tried, convicted and sentenced to death without being advised of their rights to consular assistance, as guaranteed by Article 36(1)(b) of the Vienna Convention.

16. Had Arizona authorities notified the LaGrands of their rights pursuant to the Vienna Convention, they would have exercised those rights and requested the assistance of German consular officials. Those officials would in turn immediately have provided all possible assistance.

17. In 1992, when all legal recourse at the state level had been exhausted, German consular officers learned, without benefit of any advice from officials of Arizona, of the LaGrands' case.

18. The failure of the competent officials of the United States to provide the notification required under Vienna Convention Article 36 precluded Germany from protecting both its nationals' interests and its own sovereign interests in the United

States, as provided for by Articles 5 and 36 of the Vienna Convention. Among other things, Germany was unable to provide assistance prior to trial, during trial and in any subsequent appeals, both in state and federal courts.

19. With the assistance of Germany, the LaGrands first raised the violation of the Vienna Convention rights in a *habeas corpus* petition to the federal District Court for the District of Arizona. That court rejected the assertion of this and other claims based on the domestic doctrine of procedural default. Applying this doctrine, the district court decided that, because the LaGrands had not asserted their rights under the Vienna Convention in the previous legal proceedings at the state level, they could not assert them in the federal *habeas corpus* proceedings. The district court held the procedural default doctrine to apply even though *first*, the LaGrands were unaware of their rights under the Vienna Convention at the time of the earlier state proceedings, and *second*, they were unaware precisely because the legal authorities failed to comply with their obligations under the Vienna Convention promptly to inform them of those rights. The intermediate federal court affirmed.

20. Karl LaGrand was executed on February 24, 1999, in spite of urgent appeals for clemency and numerous diplomatic interventions at the highest level by the German Government. The President and the Chancellor of the Federal Republic of Germany appealed to the President of the United States. German Foreign Minister Fischer and Justice Minister Däubler-Gmelin raised the issue with their respected counterparts in the United States administration. Démarches been undertaken by the German Ambassador

to the United States. The German Ambassador and the German Consul-General appeared before the Mercy Committee of the State of Arizona. German Foreign Minister Fischer, in a letter to the United States Secretary of State Madeleine K. Albright dated February 22, 1999, asserted a violation of Article 36 of the Vienna Convention in the case of the LaGrands. A detailed memorandum was enclosed with that letter. The United States has failed to respond to the Foreign Minister's letter.

21. Germany does not seek to bar the competent authorities of the United States from enforcing its criminal law. Germany contends, however, and has contended since it became aware of the LaGrands' case, that the competent authorities of the United States must enforce the criminal law by means that comport with the obligations undertaken by the United States pursuant to Vienna Convention.

22. Germany asks as well that the death sentence against Walter LaGrand be set aside on humanitarian grounds. Germany is motivated not only by its opposition, as a matter of principle, to the death penalty, but also by the special circumstances of the case. Karl and Walter LaGrand were only 18 and 19 years of age when they were charged with their crimes. They have spent a total of 15 years on death row.

Proceedings in the International Court of Justice

23. On March 2, 1999, the Federal Republic of Germany filed an application in the International Court of Justice, instituting proceedings against the United States for violations of the Vienna Convention, during the arrest, trial, conviction and

sentencing of the German nationals Karl and Walter LaGrand. The Federal Republic of Germany sought the remedy of *restitutio in integrum*. Germany based jurisdiction for this action on Article 36(1) of the Statute of the International Court of Justice and the Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 25, 1963, art. I, 21 U.S.T. 326, to which both the United States and Germany are States Parties.

24. Also on March 2, 1999, the Federal Republic of Germany filed a Request for Provisional Measures with the International Court of Justice, requesting the Court to indicate that the Government of the United States take the measures necessary to ensure that Mr. LaGrand not be executed pending the disposition of this case.

25. On the same day, the Vice-President and acting President of the ICJ issued the ICJ Ruling, calling upon the United States to "act in such a way as to enable any Order the Court will make on [Germany's] request for provisional measures to have its appropriate effect." The ICJ Ruling is authorized by Article 74(4) of the Rules of Court of the International Court of Justice (the "ICJ").

Arizona's Denial of a Stay

26. The Arizona clemency panel recommended that Arizona Governor Jane Dee Hull stay the execution in deference to the proceeding in the ICJ. Governor Hull has declined to issue a stay.

Defendant's Imminent Violation of the U.N. Charter and ICJ Ruling

27. Walter LaGrand is scheduled to be executed today at 5 p.m. eastern standard time. Unless this Court stays Mr. LaGrand's execution, the Federal Republic of

Germany will be denied the opportunity both to exercise its rights under the Vienna Convention and to argue the merits of its claim of right before the ICJ, a competent court that has provisionally exercised jurisdiction over the case. Such a denial would violate both the U.N. Charter and the ICJ Ruling.

COUNT ONE

(Imminent Violation of the U.N. Charter and ICJ Ruling)

28. Plaintiffs repeat and reallege paragraphs 1 through 29.

29. Execution of Mr. LaGrand by defendant, her successors, employees, officers or agents would constitute a violation of federal law in the form of the ICJ Ruling and the U.N. Charter.

COUNT TWO

(Imminent Violation of Principles of International Comity)

30. Plaintiffs repeat and reallege paragraphs 1 through 29.

31. Execution of Mr. LaGrand by the defendant, her successors, employees, officers or agents would constitute a violation of principles of international comity constituting federal law and arising from the ICJ Ruling and the U.N. Charter.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that this Court:

A. Declare that the execution of Mr. LaGrand by officials subject to the authority of defendant Jane Dee Hull, Governor of the State of Arizona, prior to the resolution of the proceedings instituted by the Federal Republic of Germany against the

United States in the International Court of Justice, or in contravention of any rulings of the International Court of Justice, would constitute a violation of federal law in the form of treaties of the United States.

B. Declare that the execution of Mr. LaGrand by officials subject to the authority of defendant Jane Dee Hull, Governor of the State of Arizona, prior to the resolution of the proceedings instituted by the Federal Republic of Germany against the United States in the International Court of Justice, or in contravention of any rulings of the International Court of Justice, would constitute a violation of principles of international comity that form part of federal law.

C. Enjoin defendant Jane Dee Hull, Governor of the State of Arizona, from executing, or permitting the execution of, Mr. LaGrand pending final resolution of the proceedings instituted by Germany against the United States in the International Court of Justice.

D Grant such other and further relief as to this Court may seem just and proper.

Dated: March 3, 1999

Respectfully submitted,

Donald Francis Donovan
Michael M. Ostrove
Daniel C. Malone
DEBEVOISE & PLIMPTON
875 Third Avenue
New York, New York 10022
212-909-6000

Peter Heidenberger/ak
Peter Heidenberger
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202-293-5555

Counsel for Plaintiffs the Federal Republic of Germany, Ambassador Jürgen Chrobog, and Consul General Wolfgang Rudolph

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-

THE FEDERAL REPUBLIC OF GERMANY;
JÜRGEN CHROBOG, Ambassador of the Federal Republic of
Germany to the United States; and
WOLFGANG RUDOLPH, Consul General
of the Federal Republic of Germany to the United States,

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MAR - 3 1999
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Plaintiffs,

— v. —

JANE DEE HULL, Governor of the State of Arizona,

Defendant.

ORIGINAL ACTION

MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT, COMPLAINT, AND BRIEF IN SUPPORT

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Counsel for Plaintiffs the Federal Republic of Germany, Ambassador Jürgen Chrobog, and Consul General Wolfgang Rudolph

Dated: March 3, 1999

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-

THE FEDERAL REPUBLIC OF GERMANY;
JÜRGEN CHROBOG, Ambassador of the Federal Republic of
Germany to the United States; and
WOLFGANG RUDOLPH, Consul General
of the Federal Republic of Germany to the United States,

Plaintiffs,

— v. —

UNITED STATES OF AMERICA and
JANE DEE HULL, Governor of the State of Arizona,

Defendants.

ORIGINAL ACTION

MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT AND FOR A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION AND BRIEF IN SUPPORT

Plaintiffs the Federal Republic of Germany, Jürgen Chrobog, as Ambassador of the Federal Republic of Germany to the United States, and Wolfgang Rudolph, as Consul General of the Federal Republic of Germany to the United States for the consular district encompassing the State of Arizona, respectfully move this Court for leave to file a Bill of Complaint and Brief in Support in an original action, pursuant to 28 U.S.C. § 1251(b)(1), and application temporarily to restrain or preliminarily to enjoin defendant from executing a German national, Walter La Grand, on March 3, 1999, or thereafter, pending final resolution of the Federal Republic of Germany's case against the United States in the International Court of Justice.

Germany bases its motion and request for provisional relief on the order of the International Court of Justice, issued within the last hour, that the United States take all measures to ensure that Mr. La Grand is not executed pending the disposition of Germany's application in that Court. It is of critical importance to the rule of law in the international community that the United States abide by the decision of the International Court of Justice in a case that the United States has by treaty agreed to submit to that Court. The ICJ's order is attached as Exhibit A.

At a minimum, this Court should grant Germany's application for a stay of or injunction against the execution pending the Court's disposition of the motion for leave to file an original bill of complaint after a normal course of briefing and deliberation on that motion. *See Faulder v. Johnson*, ___ U.S. ___, 119 S. Ct. 614 (1998).

In conjunction with this Motion, plaintiffs file a complaint and a memorandum in support of this Motion.

Dated: March 3, 1999

Respectfully submitted,

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Peter Heidenberger /kc
Peter Heidenberger
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-

THE FEDERAL REPUBLIC OF GERMANY;
JÜRGEN CHROBOG, Ambassador of the Federal Republic of
Germany to the United States; and
WOLFGANG RUDOLPH, Consul General
of the Federal Republic of Germany to the United States,

Plaintiffs,

— v. —

UNITED STATES OF AMERICA and
JANE DEE HULL, Governor of the State of Arizona,

Defendants.

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ORIGINAL ACTION

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT AND MOTION FOR PRELIMINARY INJUNCTION

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Dated: March 3, 1999

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— v. —

UNITED STATES OF AMERICA and
JANE DEE HULL, Governor of the State of Arizona,

Defendants.

ORIGINAL ACTION

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT AND MOTION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

Plaintiffs the Federal Republic of Germany, Jürgen Chrobog, as Ambassador of the Federal Republic of Germany to the United States, and Wolfgang Rudolph, as Consul General of the Federal Republic of Germany to the United States (collectively, "Germany"), respectfully submit this memorandum in support of (1) their motion for leave to file a complaint in an original action, and (2) their motion to temporarily restrain or preliminarily enjoin Defendants from executing Germany's national, Walter LaGrand, on March 3, 1999, or thereafter, pending this Court's disposition of the motion for leave to file the complaint, further order of this Court, or a ruling from the International Court of Justice (the "ICJ") on Germany's request to that court for an order of Provisional Measures and, eventually, on the merits of Germany's suit against the United States currently pending before that Court.

On March 2, 1999, the Vice-President and acting President of the ICJ issued a ruling pursuant to Article 74(4) of the ICJ's Rules of Court. As authorized by that provision, the ICJ Ruling called upon the United States to "act in such a way as to enable any Order the Court will make on [Germany's] request for provisional measures to have its appropriate effect."

Earlier today, the ICJ issued an order indicating that the United States should take all measures to ensure that Mr. LaGrand is not executed pending the disposition of Germany's application to that Court. As a matter of international law, the ICJ Order applies both to the United States and to its constituent subdivisions, such as the State of Arizona.

The actions required by the ICJ Ruling are binding upon the United States both pursuant to Article 94(1) of the United Nations Charter, a treaty of the United States. Because the ICJ Ruling carries the force of a treaty, it constitutes the supreme law of the land. U.S. Const. art. VI. Germany's complaint seeks an order from this Court enjoining defendants from their imminent violation of that law. But even if the ICJ Order were not binding, compliance by the United States' with the

Court's indication of provisional measures would plainly serve the public interest by vindicating the rule of law.

This Court has original jurisdiction to hear Germany's complaint. Article III, § 2, of the United States Constitution Article III, extends the federal judicial power to "all Cases, in Law and Equity, arising under . . . Treaties" of the United States; "to all Cases affecting Ambassadors, other Public Ministers and Consuls;" and to "Controversies . . . between a State, or the Citizens thereof, and a foreign State . . . ." U.S. Const. art. III, § 2; *see also Ex parte Gruber*, 269 U.S. 302, 303 (1925).[1] The same section provides that "[i]n all cases affecting Ambassadors, other public Ministers and Consuls," this Court shall have original jurisdiction.

At a minimum, this Court should grant Germany's application for a stay of or injunction against the execution pending the Court's disposition of the motion for leave to file an original bill of complaint after a normal course of briefing and deliberation on that motion. *See Faulder v. Johnson*, 119 S. Ct. 614 (1998). Not only do Germany's case in the ICJ and its application here involve a human life, but they raise important issues of international and United States law. As this Court will appreciate, it is no small step for a sovereign state and close ally of the United States to bring proceedings against the United States both in the ICJ and this Court. Having taken that step after lengthy deliberation, Germany deserves a considered hearing of its motion. This Court can serve the cause of respect for law only if it gives -- and is seen by the international community to give -- careful consideration to Germany's application.

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[1] *See also* THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed. 1961); *id.* NO. 81 at 487 ("Public ministers of every class, are the immediate representatives of their sovereigns. All questions in which they are concerned are so directly connected with the public peace, that, as well for the preservation of this as out of respect to the sovereignties they represent, it is both expedient and proper that such questions should be submitted in the first instance to the highest judicatory of the nation").

Facts

I.

THIS COURT SHOULD GIVE EFFECT TO THE RULING OF THE INTERNATIONAL COURT OF JUSTICE BECAUSE IT IS BINDING UPON THE UNITED STATES.

A. Pursuant to the UN Charter and International Law, The ICJ Decision Is The Supreme Law of the Land.

On October 24, 1945, both the United States of America and Germany became original members of the United Nations. As a result, the United States agreed to abide by the provisions of the Charter of the United Nations. Pursuant to the mechanism by which the United States Constitution ensures that this country's local jurisdictions respect its treaty obligations, the Charter of the United Nations became part of the "supreme Law of the Land" and binding throughout the United States. U.S. Const. art. VI. In addition, pursuant to Article 93(1) of the Charter, "[a]ll Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice." U.N. CHARTER, art. 93; *see* RESTATEMENT § 903 cmt. c. Thus, the provisions of the Statute of the ICJ also constitute the "supreme Law of the Land" under the United States Constitution.

Pursuant to Article 36(1) of the Statute of the International Court of Justice, its jurisdiction extends to "all matters specially provided for . . . in treaties and conventions in force . . . ." Statute of the International Court of Justice, Oct. 24, 1945 ("ICJ Statute"), art. 36(1), 59 Stat. 1055.

Both Germany and the United States are parties to the Vienna Convention on Consular Relations and to its Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 25, 1963, 21 U.S.T. 326. Article 36 of the Vienna Convention guarantees certain rights of consular notification and access when nationals of a sending state are detained by competent authorites of the receiving state. Article I of the Optional Protocol provides that

> [d]isputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a Party to the present Protocol.

Article 36(6) of the ICJ Statute provides that "[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."

Article 41 of the ICJ Statute provides that the Court "shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party." While the ICJ has not itself ruled whether an order indicating provisional measures is binding on the parties, RESTATEMENT § 903 cmt. e (1987), there can be no serious question that it is.

First, pursuant to Article 94(1) of the United Nations Charter, the United States has "undertake[n] to comply with the decision of the International Court of Justice in any case to which it is a party." In the plainest meaning of the term, an ICJ Ruling rendered in a contentious proceeding between parties subject to its jurisdiction and issued to further its ability to resolve the parties' dispute, is a "decision" of the Court.

Second, even if the ICJ Ruling were not a "decision" in its own right, the United States would still have an obligation to comply. The ICJ Ruling has been made pursuant to a provision of the ICJ Rules of Court expressly designed to preserve that court's ability to issue an order with respect to Provisional Measures under Article 41 of the ICJ Statute. ICJ Rules of Court, art. 74(4). In a standard and oft-repeated formulation, the ICJ has explained that

> the power of the Court to indicate provisional measures under Article 41 of the Statute has as its object to preserve the respective rights of the Parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings . . . .

Nuclear Tests (N.Z. v. France), 1973 I.C.J. 135 (Interim Protection Order of June 22). In other words, the granting of such a ruling is part and parcel of the ICJ's authority to indicate provisional measures. That authority, in turn, is intended to ensure that the Court remains in a position to render a meaningful judgment. Even were a ruling under article 74(4) of the ICJ Rules of Court or an order indicating provisional measures not regarded as a "decision" requiring compliance under the Charter, an agreement to comply with the judgment of a court cannot be squared with the latitude to deprive the court of its ability to render an effective judgment by disregarding a ruling intended to preserve the rights subject to such a judgment. Hence, by agreeing to abide by the decision of the ICJ in this case, the United States has also agreed to abide by a ruling designed to ensure the effectiveness of any such decision. *E.g.*, Vienna Convention on the Law of Treaties, May 22, 1969, art. 26, U.N. Doc. A/CONF. 39/27, 8 I.L.M. 679 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

Third, the authority of the ICJ under Article 41 simply reflects a general principle of law that would bind the United States even in the absence of that specific treaty provision. The Permanent Court of International Justice, the predecessor to the ICJ, has held that as a general principle of law, States parties must refrain from taking action to materially alter the rights of the State litigants once international proceedings have been initiated. *See Electric Company of Sofia and Bulgaria*, 1939 P.C.I.J. (Judgment), Ser. A/B, No. 77, p. 199. As the PCIJ explained, the ICJ's authority under Article 41 embodies

> the principle universally accepted by international tribunals . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute.

Electric Company of Sofia and Bulgaria, 1939 P.C.I.J (Interim Meas. of Protection), Ser. A/B, No. 77, p. 199. *See also Comité des juristes de l'étude du statut de la Cour Permanente de Justice Internationale* (First Session, 11 March 1929) (statement of Elihu Root) ("parties to a case, when they submitted their controversy to the Court, might be regarded as having come under an obligation not to destroy the subject matter of their controversy or in any way to anticipate the judgment of the Court by action of their own;" "[s]uch an obligation was implied in their acceptance of the jurisdiction of the Court") (unofficial translation). Thus, in exercising its authority under Article 41, the Court "give[s] life and blood to a rule that already exists in principle." Edvard Hambro, The Binding Character of Provisional Measures of Protection Indicated by the International Court of Justice, in *Rechtsfragen dur Internationalen Organisation* 168-69 (Walter Schatzel, et al., ed., 1956).

Finally, the ICJ is "the principal *judicial* organ of the United Nations." U.N. CHARTER, art. 92 (emphasis added). It is intrinsic to the very definition of a court that a party subject to its jurisdiction must comply with its orders, decisions, and rulings. *E.g.*, *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958). As Judge Sir Gerald Fitzmaurice stated in his separate opinion in the *Northern Cameroons Case*, explaining why provisional measures must be binding:

> Although much . . . of [the ICJ's] incidental jurisdiction is specifically provided for in the Court's Statute, or in Rules of Court which the Statute empowers the Court to make, it is really an inherent jurisdiction, the power to exercise which is a

> necessary condition of the Court – or any court of law -- being able to function at all.

(Cameroon v. U.K.) 1963 I.C.J. 15, 103 (Interim Protection Order of Dec. 2) (separate opinion of Judge Fitzmaurice). To similar effect, the Iran-United States Claims Tribunal, sitting in Full Tribunal and with the concurrence of all three United States Members, has held that it "has an inherent power to issue such orders as may be necessary to conserve the respective rights of the Parties and to ensure that this Tribunal's jurisdiction and authority are made fully effective." *E-Systems, Inc. v. Islamic Republic of Iran,* Award No. ITM 13-338-FT (Feb 4), 2 Iran-U.S. CTR 51, 57 (1983); *see also* MANLEY OTTMAR HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920-1942, 426 (1943) ("a State is under an obligation to respect the Court's indication of provisional measures").

As a matter of international law, this Court, as a component of the judicial branch of the United States Government, has the capacity to engage the international responsibility of the United States and, correspondingly, the obligation to comply with the United States' international obligations. IAN BROWNLIE, STATE RESPONSIBILITY, Part 1, 144 (1983) ("The judiciary and the courts are organs of the state and they generate responsibility in the same way as other categories of officials."); *Report of the Int'l Law Comm'n*, U.N. GAOR, 51st Sess., Supp. No. 10, at 126, U.N. Doc. A/51/10 (1996) (Draft Articles on State Responsibility) ("Draft Articles").

This Court should give effect to the decision of the International Court of Justice on Germany's request for provisional measures and thereby ensure the United States' compliance with the obligations it has voluntarily undertaken in the U.N. Charter, the ICJ Statute, the Vienna Convention, and the Optional Protocol to that Convention.

B. As A Court Of Equity, This Court Should Give Effect To the Decision of the International Court of Justice In the Interest of International Comity and the Rule of Law.

Regardless of the binding effect of a ruling from the ICJ pursuant to article 74(4) of its rules or of provisional measures indicated by the ICJ on their own terms, this Court should enforce the ICJ Ruling on equitable grounds. The essence of equitable discretion is flexibility, and no factor carries as much weight in the exercise of that discretion as the public interest. *Porter v. Warner Holding Co.*, 328 U.S. 395, 400 (1946). When the public interest is involved, the Court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Id.* at 398. "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. Co. v. System Federation No. 40, et al.*, 300 U.S. 515, 552 (1937); *see also Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946).

International comity, and respect for the rule of law on the international plane, is a principle of federal law to which this Court should give effect. Since *Erie*

Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938), in which this Court held that there is "no federal general common law," the Court has recognized that there are nonetheless areas that require the development of a "specialized" federal common law. *See* Friendly, *In Praise of* Erie *-- And the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 405 (1964). This federal common law arises either pursuant to a congressional grant of jurisdiction, *e.g.*, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957), or as a result of the need for national uniformity in a given area, *e.g. Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943). It is binding on the states pursuant to the supremacy clause. *See, e.g.*, *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423-27 (1964); *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co.*, 369 U.S. 95, 103-04 (1962).

The need for national uniformity and federal control is most compelling in matters touching on foreign relations. For example, the act of state doctrine precludes a court in the United States from passing on the validity of an "ac[t] of a governmental character done by a foreign state within its own territory and applicable there." *Restatement (Third) of the Foreign Relations Law of the United States* § 443 (1987); *see W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990); *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972); *Sabbatino, supra*. The Court has held that that doctrine supplies a federal "principle of decision binding on federal and state courts alike." *Sabbatino*, 376 at 427 [2] So too here, the issue of whether state officials should abide by an order of the International Court of Justice rendered in a case to which the United States is a party is a matter of federal law

Here, international comity overwhelming counsels in favor of showing respect for a unanimous ruling of the International Court of Justice. *Cf. Hilton v. Guyot*, 159 U.S. 113 (1894) (comity to acts of another nation). As both the major force in international affairs and a nation long committed to the rule of law, the United States would advance the public interest by respecting a ruling of the principal judicial organ of the United Nations. As Judge Schwebel, President of the ICJ, stated in explaining his vote in favor of a provisional measures in a recent ICJ case presenting similar circumstances:

> It is of obvious importance to the maintenance and development of a rule of law among States that the obligations imposed by treaties be complied with and that, where they are not, reparation be required. The mutuality of interest of States in the effective

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[2] *See also Japan Line, Ltd. v. County of Los Walteres*, 441 U.S. 434, 451 (1979) (international trade) (nation must "'speak[] with one voice when regulating commercial relations with foreign governments'") (citation omitted); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (alien registration) ("federal power in the field affecting foreign relations [must] be left entirely free from local interference"); *United States v. Belmont*, 301 U.S. 324, 331 (1937) (international negotiations and compacts) ("complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states"); *The Chinese Exclusion Case*, 130 U.S. 581, 606 (1889) (treaty law) ("For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power."); *The Federalist*, Nos. 3-5 (J. Jay), 42 (J. Madison), 80 (A. Hamilton).

> observance of the obligations of the Vienna Convention on Consular Relations is the greater in the intermixed global community of today and tomorrow (and the citizens of no State have a higher interest in the observance of those obligations than the peripatetic citizens of the United States). In my view, these considerations outweigh the serious difficulties which this Order imposes on the authorities of the United States and Virginia.

Vienna Convention on Consular Relations (Para. v. U.S.) (Provisional Measures Order of Apr. 9, 1998) (Declaration of President Schwebel).[3] As Judge Schwebel recognized, if the United States wishes to advance the rule of law, it must show respect for the rule of law even when – indeed, especially when – compliance poses "serious difficulties." *See, e.g., Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958).

In the exercise of its equitable discretion, in the interest of the rule of law, and out of comity to the principal judicial organ of the modern international legal order, this Court should give effect to the ICJ Ruling indicating provisional measures.

II.

THIS COURT SHOULD ENJOIN DEFENDANTS FROM VIOLATING THE ICJ RULING AND THE U.N. CHARTER.

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[3] Before his election to the Court in 1981, Judge Schwebel served as, among other things, Deputy Legal Advisor to the United States Department of State and Executive Director of the American Society of International Law. Pursuant to Article 32(1) of the Rules of the Court, Judge Schwebel, as a national of the United States, does not preside in Germany's proceeding against the United States.

A. *Ex Parte Young* And The Treaties Fully Authorize Germany's Suit.

In *Ex parte Young*, this Court held the Eleventh Amendment's sovereign immunity not to apply to suits against state officials acting in their official capacity, provided that the plaintiff sought only a prospective injunction to compel the state officials to comply with federal law. 209 U.S. 123, 159-160 (1908). As this Court explained, where a state official acts in a manner inconsistent with federal law, "[t]he State has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Id.; accord* U.S. CONST. art. VI, cl. 2.

Under the *Ex parte Young* doctrine, the plaintiff may seek prospective injunctive relief, *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974), against an "ongoing" violation of federal law from which the plaintiff is currently suffering, *Papasan v. Allain*, 478 U.S. 265, 282 (1986), or from the continuing consequences of a completed violation, *Milliken v. Bradley*, 433 U.S. 267, 288-90 (1977). This requirement ensures that a plaintiff cannot use *Ex parte Young* to perpetrate "a raid on the state treasury for an accrued monetary liability." *Milliken v. Bradley*, 433 U.S. 267, 290 n.22 (1977). At the same time, the availability of injunctive relief under *Ex parte Young* is "necessary to vindicate the federal interest in assuring the supremacy of [federal] law." *Papasan*, 478 U.S. at 278 (internal quotation omitted).

Here, plaintiff seeks precisely the relief permitted under *Ex parte Young* -- an injunction preventing defendants, acting in their official capacities, from executing LaGrand in violation of Germany's rights under the ICJ Ruling and the U.N. Charter. The doctrine of *Ex Parte Young*, 209 U.S. 123, 156 (1908), permits a federal court to enjoin state officers "who threaten and are about to commence" unlawful activity. *See also Morales v. Trans-World Airways, Inc.*, 504 U.S. 374, 381 (1992). As set forth above, the ICJ Ruling is binding on the United States through the mechanism of the United Nations Charter. No violation of that ruling has yet occurred, but the ICJ Ruling, and with it federal law in the form of the U.N. Charter, are in danger of imminent violation. Mr. LaGrand's execution is scheduled for today, March 3, 1999, and the Governor of Arizona has publicly made known his intention to see the execution through unless this Court orders otherwise. In these circumstances, there can be no question that plaintiffs face the threat of imminent, future violation of their federal rights by way of the intention of Arizona officials to go forward with the execution of Germany's national even in the face of the ICJ Ruling calling on the United States to halt that execution. Jordan J. Paust, *Breard and Treaty-Based Rights Under the Consular Convetion*, 92 Am.J. Int'l L. 691, 696 (1998) ("to say that a past failure to notify [the sending state's counsul officials] 'has no continuing effect' seems unreal in view of the outcry from several foreign states and Paraguay's efforts within the United States and before the International Court of Justice. The failure to notify effectively precluded the foreign consul and the foreign state from meaningfully assisting their national."). There can also be no question that the relief plaintiffs seek is prospective, as the rights on which they found this complaint arose just hours ago when the ICJ issued its order and the execution they seek to halt has not yet taken place. An injunction or stay from this Court would therefore be purely prospective in nature and would prevent the defendants from their intended, imminent violation of federal law.

The Court's decision in *Breard* is not to the contrary. 118 S. Ct. at 1356. *First*, because that opinion was issued in response to a petition for certiorari and and motion for leave to file an original bill, which are both discretionary, it does not carry precedential force. *Second*, to the extent the Court addressed the Eleventh Amendment issue, it noted merely that in light of that Amendment, Paraguay's suit "might" not succeed. Hence, the Court itself did not regard its opinion as a holding. *Finally*, even that prediction was based on the specific facts of Paraguay's case, as the Court explained in that case that it did not believe that the violation there could have had any continuing effect so as to fall within the *Ex parte Young* doctrine.

In any event, by its express terms, the Eleventh Amendment does not apply to this action by the Federal Republic of Germany, a foreign state, as opposed to citizens or subjects thereof. U.S. Const. amend. XI. Nor do any underlying principles of sovereign immunity bar the action. While *Monaco v. Mississippi*, 292 U.S. 313 (1934), recognized a rule of nonconstitutional sovereign immunity in suits based on contractual obligations brought by foreign states against states of the United States, that rule should not extend to an action by a foreign state asserting treaty rights. If the Commonwealth of Virginia "does not exist" for foreign relations purposes, *United States v. Pink*, 315 U.S. 203, 234 (1942) (internal quotation omitted), neither it nor its officials should be permitted to claim immunity from suit in federal court in an action, like this one, that seeks to enforce an international obligation entered into by the United States in the exercise of its authority in foreign relations. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-22 (1936) (because states never had sovereignty for purposes of foreign relations, federal government's authority in the area is plenary). Simply put, in the area of foreign relations and the United States' international obligations, the individual states had no sovereign immunity to cede.

B. Plaintiffs Are Entitled To The Relief They Seek.

The traditional standard for granting an injunction, preliminary or permanent, requires the plaintiff to show that "in the absence of its issuance he will suffer irreparable injury and also that he is likely to prevail on the merits." *Doran v. Salem Inn*, 422 U.S. 922, 931 (1978). The only difference between the two standards is that for a preliminary injunction a plaintiff need only show that his success on the merits is likely whereas for a permanent injunction a plaintiff must actually succeed on the merits. *University of Texas v. Camenisch*, 451 U.S. 390, 392 (1981).

Under either standard, Germany is entitled to the injunction it seeks. As an initial matter, there can be no dispute as to the relevant facts, as the only facts relevant to this request are the issuance of the ICJ Ruling and the impending execution.

Further, it is plain that unless this Court enjoins Defendants from executing LaGrand today, Germany's national will be dead. In that event, the ICJ Ruling could never be complied with. It goes without saying that the fact that "irreparable harm will result if a stay is not granted . . . is necessarily present in capital cases." *Wainwright v. Booker*, 473 U.S. 935, 935 n.1 (1985) (Powell, J., concurring).

Similarly, there can be no doubt of Germany's likelihood of success on the merits. The ICJ Ruling is clear: the United States is to ensure that Mr. LaGrand is not executed. A ruling that binds the United States also binds the state actors charged with the enforcement of that order. U.S. CONST. art. VI, cl. 2 (The United States' international obligations form part of "the supreme Law of the Land."). State interests cannot override federal authority in the area of foreign relations. *United States v. Pink*, 315 U.S. at 234 (individual states "do[] not exist" for foreign relations purposes); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. at 315-22 (because states never had sovereignty for purposes of foreign relations, federal government's authority in the area is plenary); *see also Zschernig v. Miller*, 389 U.S. 429 (1968).

In addition, were the Court to find it necessary to balance the hardships, they would clearly favor Germany. If this Court gives effect to the ICJ Ruling, Mr. LaGrand will still remain in custody. If the United States prevails on the merits, Arizona will be able to execute Mr. LaGrand. If the United States did not prevail, Arizona would at worst -- depending upon the relief ordered by the Court -- have to retry Mr. LaGrand, as Germany has sought no relief barring retrial or immunizing Mr. LaGrand from the charges Arizona has brought. The impact on Arizona of a delay in the execution of Mr. LaGrand cannot compare to the irreparable injury caused by his death -- not to mention the magnitude of a decision by this Court not to give effect to a unanimous decision of the International Court of Justice.

Finally, as discussed above in Part I.B., the injunction sought by Germany is clearly in the public interest. The United States is responsible under international law for the acts of its constituent entities. *See, e.g.*, Jiménez de Aréchaga, *International Responsibility*, *in* MANUAL OF PUBLIC INTERNATIONAL LAW, 531, 557 (Max Sørensen, ed., 1968) ("It is a generally accepted principle of international law that a federal state is responsible for the conduct of its political sub-divisions and cannot evade that responsibility by alleging that its constitutional powers of control over them are insufficient for it to enforce compliance with international obligations."); Draft Articles at 127. If this Court does not enjoin defendants from executing Mr. LaGrand, it will place the United States squarely in violation of the ICJ Ruling and the U.N. Charter. This Court should not countenance such a result.

III.

THIS COURT SHOULD GRANT GERMANY'S MOTION FOR LEAVE TO FILE.

Mindful of this Court's busy appellate docket and stated preference against acting as trier of fact in the first instance, Germany nevertheless respectfully submits that this is precisely the type of action in which the Court should exercise its original jurisdiction. Germany's case presents issues "of federal law and national import as to which [the Court is] the primary overseer[]." *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498 (1971)

This Court makes "case-by-case judgments as to the practical necessity of an original forum in this Court for particular disputes within [its] constitutional original jurisdiction . . . exercis[ing] that discretion with an eye to promoting the most effective functioning of this Court within the overall federal system." *Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992) (*quoting Texas v. New Mexico*, 462 U.S. 554, 570 (1983) (internal citations omitted). In *Wyandotte*, the Court held that it can decline to exercise its concurrent original jurisdiction

> only where we can say with assurance that (1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant and (2) the reasons of practical wisdom that persuade us that this Court is an inappropriate forum are consistent with the proposition that our discretion is legitimated by its use to keep this aspect of the Court's functions attuned to . . . its other responsibilities.

401 U.S. at 499.

Applying those guidelines here, the Court should grant Germany's motion. *First*, because this motion seeks only to enforce the order issued by the ICJ enjoining the execution of Mr. LaGrand until that court arrives at a final decision on the merits, the case does not present significant difficulties of factfinding. *Id.* at 498. The only relevant facts are the terms of the ICJ Ruling and the imminent execution, neither of which can be or are disputed. Hence, this complaint calls upon the Court's competence as a tribunal that decides questions of law of national importance.

Second, this motion, seeking to prevent the failure of state officials to respect treaty obligations owed by the United States to a foreign sovereign, falls within a category of cases that the Constitution's Framers specifically intended the federal courts in general, and this Court in particular, to decide. For the reasons set forth above, a denial of the motion in this case would clearly "disserve . . . the principal policies underlying the Article III jurisdictional grant," *id.* at 499, over "Cases affecting . . . Consuls." U.S. CONST. art. III, § 2, cl. 2. *See also* Petition, No. 97-1390, at 22-29.

CONCLUSION

For the foregoing reasons, Germany respectfully requests that this Court (a) (*i*) grant Germany's motion for leave to file; and (*ii*) issue a temporary restraining order or preliminary injunction barring defendants from executing of Germany's national, Walter LaGrand, during the pendency of this motion for leave to file, or a permanent injunction barring defendants from executing him at any time prior to the resolution of Germany's action against the United States in the International Court of Justice; or (b) in the alternative, grant such relief pending the Court's disposition of the motion for leave to file an original bill of complaint after a normal course of briefing and deliberation on that motion.

Dated: March 3, 1999

Respectfully submitted,

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Annex MG 28

LETTER OF THE U.S. SOLICITOR GENERAL TO THE SUPREME COURT OF THE UNITED STATES (3 MARCH 1999)

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

March 3, 1999

Hon. William Suter
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Federal Republic of Germany, et al. v. United States of America and Jane Dee Hull

Dear Mr. Suter:

We have just received from the Clerk's Office (although we were not served), at 4:25 p.m., the Motion for Leave to File a Bill of Complaint and the Memorandum in support thereof filed by the Federal Republic of Germany. (A Motion to temporarily restrain the execution of Walter LaGrand was received 20 minutes later.) We have not had time to read the materials thoroughly or to digest the contents. Based on our understanding of the proceedings and the basis for the claim by the Federal Republic of Germany, it is our position that the Vienna Convention does not furnish a basis for this Court to grant a stay of execution.

Insofar as the United States is a named defendant, we are not aware of any applicable waiver of sovereign immunity of the United States to this original action filed by a foreign nation or its ambassador or consul. The execution is in any event to be carried out by the State of Arizona, not the United States.

Insofar as the suit is brought against the Governor of Arizona, as we explained in our response to the similar filing last year in Paraguay v. Gilmore and Breard v. Greene, 118 S. Ct. 1352, neither a foreign state nor its consular officer has a judicial cause of action or remedy in domestic courts to obtain the vacatur of a criminal conviction on the basis of the failure by the receiving state to notify a defendant of his right to consular officials (pp. 15-28); this case is not in any event within the core of the Court's original jurisdiction (if within the Court's jurisdiction at all) as a case "affecting" a consul (pp. 33-36); and an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief (pp. 49-51). In addition, the Court held in the comparable *Breard* case that the suit against the Governor based on an alleged past violation of the Convention was barred by the Eleventh Amendment. 118 S. Ct. at 1356.

For the foregoing reasons, we respectfully submit that the alleged violation of the Vienna Convention does not furnish a basis for this Court to grant a stay of execution.

Respectfully,

Seth P. Waxman/ESK

Seth P. Waxman
Solicitor General
Counsel of Record

Annex MG 29

SUPREME COURT OF THE UNITED STATES, PLAINTIFFS' REPLY TO THE UNITED STATES

(3 MARCH 1999)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 127, Orig. (A-736)

THE FEDERAL REPUBLIC OF GERMANY; JÜRGEN CHROBOG,
Ambassador of the Federal Republic of Germany
to the United States; and WOLFGANG RUDOLPH, Consul General
of the Federal Republic of Germany to the United States,
Plaintiffs,

— v. —

UNITED STATES OF AMERICA and
JANE DEE HULL, Governor of the State of Arizona,
Defendants.

ORIGINAL ACTION

PLAINTIFFS' REPLY TO THE UNITED STATES

Plaintiffs the Federal Republic of Germany, Jürgen Chrobog, as Ambassador of the Federal Republic of Germany to the United States, and Wolfgang Rudolph, as Consul General of the Federal Republic of Germany to the United States for the consular district encompassing the State of Arizona (collectively, "Germany"), respectfully submit this reply to the Solicitor General's letter response dated this date.

The United States offers four reasons why this Court should not grant Germany leave to file. Far from providing reasons why this Court should not grant leave, the considerations raised by the United

States reinforce the need for this Court to allow itself time for due consideration of the issues raised by Germany's motion.

First, the United States offers its view that the Vienna Convention on Consular Relations does not afford a cause of action to a foreign state for vacatur of a criminal conviction for failure to comply with the notification obligations imposed by the Convention. The United States' position is carefully limited on this point: as it made clear in its submission in *Breard v. Greene*, 118 S. Ct. 1352 (1998), the United States does not necessarily believe that a foreign state would be barred from bringing an action for "an order directing cessation of an ongoing refusal of authorities to allow consular notification or access, as guaranteed by the Convention." Brief for the United States as Amicus Curiae at 15, *Breard v. Greene*, 118 S. Ct. 1352 (1998) (Nos. 97-8214 (A-732), 97-1390 (A-738), 97-8660 (A-767) and No. 125, Orig. (A-771)). Even that circumscribed view is directly inconsistent with the principle of state responsibility under international law that a state that violates an international obligation must restore the situation that would have existed but for the violation. *See, e.g., Chorzów Factory (Ger. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Judgment (Indemnity) of Sept. 13). But even on the United States' view, the scope of a foreign state's cause of action under the Convention requires careful parsing of the instrument. Surely, the International Court of Justice is well-equipped to perform that task. But insofar as this Court determines to consider the question, it should not do so without full briefing and full consideration.

Second, the United States suggests, though it does not state definitively, that this case may not fall within the "core," or even any part, of the constitutional head of jurisdiction covering "all Cases affecting Ambassadors, other Public Ministers and Consuls." U.S. Constitution, art. III, sec. 2. To the contrary, the plain terms of the constitutional provisions would encompass a case arising from a violation of the Vienna Convention on Consular Relations and involving the scope of a consul's right to notification and access under that Convention. But again, the issue, at a minimum, deserves this Court's careful consideration after full briefing.

Third, the United States suggests that an order of provisional measures issued by the International Court of Justice is not binding. Though scholars have debated the question, there is, at a minimum, abundant authority in support of the view that such an order does bind the parties in the case before the Court — a view that is also supported by every consideration of the judicial function.

> The whole logic of the jurisdiction to indicate interim measures entails that, when indicated, they are binding — for this jurisdiction is based on the absolute necessity, when the circumstances call for it, of being able to preserve, and to avoid prejudice to, the rights of the parties, as determined by the final judgement of the Court.

Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice* 548 (1986) (footnote omitted).

Moreover, there is little or no disagreement that, as a general principle of law, a party before an international tribunal has an obligation to take no steps that will interfere with the tribunal's capacity to decide the dispute in accordance with law. The Permanent Court of International Justice held that there is a

> principle universally accepted by international tribunals . . . to the effect that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute.

Electric Company of Sofia and Bulgaria, 1939 P.C.I.J. (Judgment), Ser. A/B, No. 77, p. 199. This Court, as a court of justice, is particularly well-suited both to appreciate and to vindicate that principle, which is as essential to a court's ability to function as it is to a regime of law.

The Court should therefore enter the stay or injunction requested as a matter of its equitable discretion regardless whether an order of provisional measures under Article 41 of the ICJ Statute is binding. Again, however, to the extent that question is relevant, the Court should decide it only after full briefing and full consideration.

Finally, the United States suggests that this Court held in *Breard* that the Eleventh Amendment barred a suit such as this one. The Court rendered no such holding. As an initial matter, the Court's order in Paraguay's case came on a discretionary motion, and therefore does not constitute binding precedent. In any event, in denying Paraguay leave to file, the Court said only that the Eleventh Amendment "might" pose a bar, and even that observation was premised on the Court's view of the facts of that case — specifically, that the violation could have had no consequence. 118 S. Ct. at 1356. Indeed, in proceedings in the Court of Appeals in *Paraguay v. Allen*, the United States both (a) expressly declined to endorse the lower courts' holding that the Eleventh Amendment barred a suit such as Paraguay's, and (b) suggested that the Eleventh Amendment might not apply to a suit by a sovereign under an international obligation of the United States, because as to such an obligation the individual states of the United States had had no sovereignty to cede. Brief for Amicus Curiae United States, *Republic of Paraguay v. Allen*, No. 96-2770 (4th Cir.) (April 1997). (We attach the relevant pages of that brief.)

As a matter of international law, this Court engages the United States' international responsibility as fully as does the executive branch of the federal government or any government of one of the federated states. IAN BROWNLIE, STATE RESPONSIBILITY, Part 1, 144 (1983) ("The judiciary and the courts are organs of the state and they generate responsibility in the same way as other categories of officials."); *Report of the Int'l Law Comm'n*, U.N. GAOR, 51st Sess., Supp. No. 10, at 126, U.N. Doc. A/51/10 (1996) (Draft Articles on State Responsibility). Given the United States' support for

the rule of law worldwide, and the influence of this Court in both the domestic and international legal orders, it would be hard to overemphasize the importance that attaches to this Court's willingness to respect — whether as a matter of binding legal obligation or court-to-court comity — a unanimous decision of the International Court of Justice. That the case may raise difficult questions only reinforces the importance of the United States' compliance with — and this Court's demonstration of respect for — the ICJ's order.

Germany again respectfully requests that the Court grant (a) its motion for leave to file an original bill of complaint and accompanying motion for provisional relief, or (b) in the alternative, grant a stay of or injunction against the execution of Germany's national pending the Court's full consideration of and due deliberation on Germany's submissions.

Dated: March 3, 1999

Respectfully submitted,

/s/

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Annex MG 30

SUPREME COURT OF THE UNITED STATES,
PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA,
WALTER LAGRAND V. *ARIZONA*
(3 MARCH 1999),
119 S.CT. 1137

119 S.Ct. 1137 (Mem)
67 USLW 3557
(Cite as: 119 S.Ct. 1137)

Walter Burnhart LaGRAND, petitioner,
v.
ARIZONA.
No. 98-8343 (A-734).

Supreme Court of the United States

March 3, 1999.

Application for stay of execution of sentence of death presented to Justice O'CONNOR and by her referred to the Court denied. Petition for writ of certiorari to the Supreme Court of Arizona denied.

Justice BREYER, joined by Justice STEVENS, dissenting:

For the reasons set forth in my opinion dissenting from the denial of a stay in Federal Republic of Germany v. United States, No. 127, Orig., and because this petition for certiorari in part raises similar issues, I would grant a stay of execution.

Annex MG 31

SUPREME COURT OF THE UNITED STATES,
STEWART V. *WALTER LAGRAND*
(3 MARCH 1999),
119 S.CT. 1018

119 S.Ct. 1018
1999 Daily Journal D.A.R. 2199, 12 Fla. L. Weekly Fed. S 139
(Cite as: 119 S.Ct. 1018)

Terry STEWART, Director, Arizona
Department of Corrections,
et al.,
v.
Walter LaGRAND.
No. A-735 (98-1412).

Supreme Court of the United States
March 3, 1999.

Inmate who was sentenced to death petitioned for writ of habeas corpus, challenging lethal gas as a cruel and unusual form of execution. The District Court denied petition and denied certificate of appealability. The United States Court of Appeals for the Ninth Circuit granted certificate of appealability, and enjoined State from executing petitioner by means of lethal gas. State petitioned for writ of certiorari. The Supreme Court held that: (1) petitioner waived claim that execution by lethal gas violated Eighth Amendment by choosing to be executed by lethal gas rather than lethal injection; (2) petitioner could not show cause for failing to raise claim on direct appeal; and (3) petitioner waived claim that his trial counsel was ineffective.
Reversed; injunction vacated.
Justice Souter filed opinion concurring in part and concurring in judgment in which Justices Ginsburg and Breyer joined.
Justice Stevens filed dissenting opinion.

[1] CONSTITUTIONAL LAW k43(1)
92k43(1)
Inmate sentenced to death waived claim that execution by lethal gas violated Eighth Amendment's prohibition of cruel and unusual punishment by choosing to be executed by lethal gas rather than lethal injection, where state law provided inmates with choice of execution by lethal gas or lethal injection, and made lethal injection the default form of execution. U.S.C.A. Const.Amend. 8; A.R.S. s 13-704, subd. B.
[2] HABEAS CORPUS k407

197k407

Habeas petitioner convicted of capital murder could not show cause for failing to raise on direct appeal claim that execution by lethal gas violated Eighth Amendment's prohibition of cruel and unusual punishment, as required to overcome procedural bar in habeas proceeding; constitutionality of lethal gas executions was being debated at time of direct appeal, and several states were reconsidering use of that method of execution immediately prior to the appeal. U.S.C.A. Const.Amend. 8.

[3] HABEAS CORPUS k898(1)

197k898(1)

Habeas petitioner waived claim that his trial counsel was ineffective in capital murder case, where petitioner represented to district court prior to filing his first federal habeas petition that there was no basis for such claims. U.S.C.A. Const.Amend. 6.

[4] HABEAS CORPUS k405.1

197k405.1

Habeas petitioner's ineffective assistance claim was procedurally defaulted, where state court had ruled that his ineffective assistance arguments were barred pursuant to a state procedural rule, and petitioner failed to demonstrate cause or prejudice for his failure to raise those claims on direct review. U.S.C.A. Const.Amend. 6.

[4] HABEAS CORPUS k422

197k422

Habeas petitioner's ineffective assistance claim was procedurally defaulted, where state court had ruled that his ineffective assistance arguments were barred pursuant to a state procedural rule, and petitioner failed to demonstrate cause or prejudice for his failure to raise those claims on direct review. U.S.C.A. Const.Amend. 6.

*1019 ON APPLICATION TO LIFT RESTRAINING ORDER AND PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

PER CURIAM.

Walter LaGrand and Karl LaGrand were each convicted of first-degree murder, attempted murder in the first degree, attempted armed robbery and two counts of kidnapping. The Arizona Supreme Court gave a detailed account of the crime in Walter LaGrand's appeal. See State v. LaGrand, 153 Ariz. 21, 734 P.2d 563, 565-66 (1987). Following a jury trial, both Karl LaGrand and Walter LaGrand were convicted on all charges and sentenced to death. The Arizona Supreme Court affirmed the convictions and sentences. State v. LaGrand, 152 Ariz.

483, 733 P.2d 1066 (1987) (Karl LaGrand); State v. LaGrand, supra (Walter LaGrand). Subsequently, we denied the LaGrands' petitions for certiorari. See 484 U.S. 872, 108 S.Ct. 206, 98 L.Ed.2d 157 (1987).

The LaGrands then filed petitions for writs of habeas corpus pursuant to 28 U.S.C. s 2254. Until then, Walter LaGrand had been represented by Bruce Burke, a Tucson lawyer. Before appointing Burke as counsel in the habeas proceeding, however, the District Court required Burke to discuss all possible claims of ineffective assistance of counsel with Walter LaGrand and to file a status report with the court. See LaGrand v. Stewart, 133 F.3d 1253, 1269 (C.A.9 1998). Walter LaGrand informed Burke that he did not desire a new attorney and requested that Burke continue to represent him. Ibid. Nevertheless, after Burke learned that Karl LaGrand was pursuing ineffective assistance of counsel claims, Burke moved to withdraw as counsel. The District Court denied this motion on the ground that "Walter LaGrand entered a waiver of any potential claims of ineffective assistance of counsel and Burke indicated to the Court that he believes no such grounds exist." LaGrand v. Lewis, 883 F.Supp. 451, 456 n. 3 (1995). The Ninth Circuit affirmed, holding that "[w]hen Walter waived the offer of new counsel, he was waiving the benefits of new representation, among which would potentially have been the presentation of this sort of [ineffective assistance claim]." LaGrand v. Stewart, supra, at 1269.

Among the claims raised in Walter LaGrand's petition for a writ of habeas corpus was the claim that execution by lethal gas constituted cruel and unusual punishment under the Eighth Amendment to the United States Constitution. The District Court found the claim to be procedurally defaulted because Walter LaGrand had failed to raise it either on direct appeal or in his petition for state post-conviction relief, when the sole method of execution was by way of lethal gas. On appeal, the Ninth Circuit did not reach the issue of procedural default because it found the claim was not ripe until and unless LaGrand chose gas as his method of execution. LaGrand v. Stewart, supra, at 1264. The petition for writ of habeas corpus was denied. Id., at 1269.

In February 1999, Karl LaGrand filed a successive state petition for post- conviction relief raising the claim that execution by lethal gas constituted cruel and unusual punishment. The trial court found the claim moot and precluded due to Karl LaGrand's failure to raise the claim in prior state court proceedings, and the Arizona Supreme Court denied review. Karl LaGrand again raised the claim in a second federal habeas corpus petition. The District Court again found the claim procedurally defaulted and concluded that Karl LaGrand had failed to establish cause and prejudice or a fundamental miscarriage of justice to excuse the default. The *1020 District Court denied that petition, but the Court of Appeals reversed.

The Ninth Circuit held that Karl LaGrand's lethal gas claim was procedurally barred but found cause and prejudice to excuse the default. The court concluded that Karl LaGrand's failure to raise the lethal gas claim was excused because there was no legal or factual basis for the claim when he pursued his direct appeal in state court. Prejudice was shown because he was now faced with execution by a method the Ninth Circuit had previously found to be unconstitutional.

The Ninth Circuit also addressed the State's argument that Karl LaGrand's choice of execution method constituted a waiver of his current claim. According to the Ninth Circuit, its precedent dictated that "Eighth Amendment protections may not be waived, at least in the area of capital punishment." See LaGrand v. Stewart, — F.3d —, — - —, 1999 WL 101412, at 10- 11 (C.A.9 February 24, 1999). As part of its ultimate order, the Court of Appeals stayed Karl LaGrand's execution and enjoined Arizona "from executing Karl Hinze LaGrand, or anyone similarly situated, by means of lethal gas." LaGrand v. Stewart, — F.3d —, 1999 WL 101412 (C.A.9 February 24, 1999). The State filed an application to vacate the stay, which we granted. Subsequently, Karl LaGrand's lawyers moved to clarify our order to determine whether the Ninth Circuit's injunction was still in place. We denied this motion. At the last moment, Karl LaGrand requested the use of lethal injection, which the State allowed, and the validity of the Ninth Circuit's injunction was not tested.

This case followed. Like Karl LaGrand, Walter LaGrand filed a petition for writ of habeas corpus challenging lethal gas as a cruel and unusual form of execution. The District Court declined to follow the Ninth Circuit's previous opinion in LaGrand v. Stewart, — F.3d —, 1999 WL 101412 (C.A.9 February 24, 1999), concluding that our lifting of the stay of execution necessarily vacated the merits of the Ninth Circuit's decision. The District Court also denied a certificate of appealability, concluding "that the issue of procedural default of Petitioner's lethal gas challenge is not debatable among jurists of reason."

The Ninth Circuit panel granted a certificate of appealability and proceeded to the merits of the case. It concluded that our order lifting the stay of execution in LaGrand v. Stewart, — F.3d —, 1999 WL 101412 (C.A.9 February 24, 1999), did not pass upon the merits of the panel's opinion and concluded that its reasoning remained sound. It then denied the stay of execution but restrained and enjoined the State of Arizona from executing Walter LaGrand by means of lethal gas. The State has filed a petition for writ of certiorari and an application to lift the Court of Appeals' injunction. We now grant the petition for certiorari, summarily reverse the judgment and vacate the Court of Appeals' injunctive order.

I

[1] Walter LaGrand, by his actions, has waived his claim that execution by lethal gas is unconstitutional. At the time Walter LaGrand was sentenced to death, lethal gas was the only method of execution available in Arizona, but the State now provides inmates a choice of execution by lethal gas or lethal injection, see Ariz.Rev.Stat. s 13-704(B) (creating a default rule of execution by lethal injection). Walter LaGrand was afforded this choice and decided to be executed by lethal gas. On March 1, 1999, Governor Hull of Arizona offered Walter LaGrand an opportunity to rescind this decision and select lethal injection as his method of execution. Walter LaGrand, again, insisted that he desired to be executed by lethal gas. By declaring his method of execution, picking lethal gas over the state's default form of execution-- lethal injection--Walter LaGrand has waived any objection he might have to it. See, e.g., Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). To hold otherwise, and to hold that Eighth Amendment protections cannot be waived in the capital context, would create and apply a new procedural rule in violation of Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

*1021 II [2] In addition, Walter LaGrand's claims are procedurally defaulted, and he has failed to show cause to overcome this bar. See Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). At the time of Walter LaGrand's direct appeal, there was sufficient debate about the constitutionality of lethal gas executions that Walter LaGrand cannot show cause for his failure to raise this claim. Arguments concerning the constitutionality of lethal gas have existed since its introduction as a method of execution in Nevada in 1921. See H. Bedau, The Death Penalty in America 16 (1982). In the period immediately prior to Walter LaGrand's direct appeal, a number of states were reconsidering the use of execution by lethal gas, see Gray v. Lucas, 710 F.2d 1048, 1059-61 (C.A.5 1983) (discussing evidence presented by the defendant and changes in Nevada's and North Carolina's methods of execution), and two United States Supreme Court Justices had expressed their views that this method of execution was unconstitutional, see Gray v. Lucas, 463 U.S. 1237, 1240-44, 104 S.Ct. 211, 77 L.Ed.2d 1453 (1983) (Marshall, J., joined by Brennan, J., dissenting from denial of certiorari). In addition, lethal gas executions have been documented since 1937, when San Quentin introduced it as an execution method, and studies of the effect of execution by lethal gas date back to the 1950s. See Bedau, supra, at 16.

III

[3][4] Walter LaGrand's alternative argument, that his ineffective assistance of counsel claim suffices as cause, also fails. Walter LaGrand specifically waived the claim that his trial counsel was ineffective, representing to the District Court prior to filing his first federal habeas petition that there was no basis for such claims. See LaGrand v. Lewis, supra, at 456 n. 3; LaGrand v. Stewart, supra, at 1269. In addition, the ineffective assistance claim is, itself, procedurally defaulted. The Arizona court held that Walter LaGrand's ineffective assistance arguments were barred pursuant to a state procedural rule, see State v. LaGrand, No. CR-07426, Minute Entry (Pima County Super. Ct. March 2, 1999), and Walter LaGrand has failed to demonstrate cause or prejudice for his failure to raise these claims on direct review. Accordingly, the judgment of the United States Court of Appeals for the Ninth Circuit is reversed and its injunctive order is vacated.

CONCURRING OPINION

Justice SOUTER, with whom Justice GINSBURG and Justice BREYER join, concurring in part and concurring in the judgment.

I join Part I of the Per Curiam Opinion, on the understanding that petitioner makes no claim that death by lethal injection would be cruel and unusual under the Eighth Amendment. I do not reach any issue of the applicability of Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

Justice STEVENS dissents.

DISSENTING OPINION

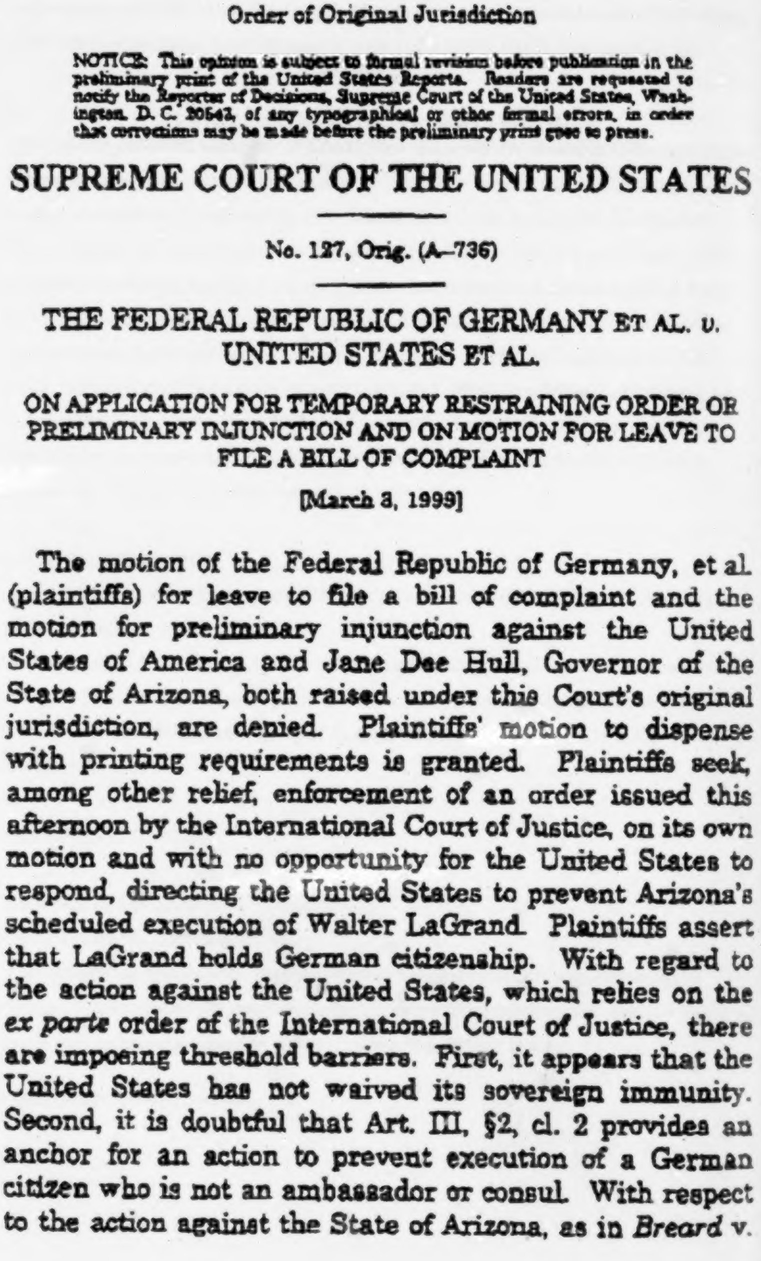
Justice STEVENS, dissenting.

In my opinion the answer to the question whether a capital defendant may consent to be executed by an unacceptably torturous method of execution is by no means clear. I would not decide such an important question without full briefing and argument.

I, therefore, respectfully dissent.

Annex MG 32

SUPREME COURT OF THE UNITED STATES,
FEDERAL REPUBLIC OF GERMANY V. UNITED STATES
(3 MARCH 1999)



Order of Original Jurisdiction

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 127, Orig. (A–736)

THE FEDERAL REPUBLIC OF GERMANY ET AL. v. UNITED STATES ET AL.

ON APPLICATION FOR TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION AND ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

[March 3, 1999]

The motion of the Federal Republic of Germany, et al. (plaintiffs) for leave to file a bill of complaint and the motion for preliminary injunction against the United States of America and Jane Dee Hull, Governor of the State of Arizona, both raised under this Court's original jurisdiction, are denied. Plaintiffs' motion to dispense with printing requirements is granted. Plaintiffs seek, among other relief, enforcement of an order issued this afternoon by the International Court of Justice, on its own motion and with no opportunity for the United States to respond, directing the United States to prevent Arizona's scheduled execution of Walter LaGrand. Plaintiffs assert that LaGrand holds German citizenship. With regard to the action against the United States, which relies on the *ex parte* order of the International Court of Justice, there are imposing threshold barriers. First, it appears that the United States has not waived its sovereign immunity. Second, it is doubtful that Art. III, §2, cl. 2 provides an anchor for an action to prevent execution of a German citizen who is not an ambassador or consul. With respect to the action against the State of Arizona, as in *Breard* v.

Greene, 118 S. Ct. 1352, 1356 (1998), a foreign government's ability here to assert a claim against a State is without evident support in the Vienna Convention and in probable contravention of Eleventh Amendment principles. This action was filed within only two hours of a scheduled execution that was ordered on January 15, 1999, based upon a sentence imposed by Arizona in 1984, about which the Federal Republic of Germany learned in 1992. Given the tardiness of the pleas and the jurisdictional barriers they implicate, we decline to exercise our original jurisdiction.

JUSTICE SOUTER with whom JUSTICE GINSBURG joins, concurring.

I join in the foregoing order, subject to the qualification that I do not rest my decision to deny leave to file the bill of complaint on any Eleventh Amendment principle. In exercising my discretion, I have taken into consideration the position of the Solicitor General on behalf of the United States.

JUSTICE BREYER, with whom JUSTICE STEVENS joins, dissenting.

The Federal Republic of Germany has filed a motion for leave to file a complaint, seeking as relief an injunction prohibiting the execution of Walter LaGrand pending final resolution of Germany's case against the United States in the International Court of Justice (ICJ) — a case in which Germany claims that Arizona's execution of LaGrand violates the Vienna Convention. The Federal Republic also seeks a stay of that execution "pending the Court's disposition of the motion to file an original bill of complaint after a normal course of briefing and deliberation on that motion." The International Court of Justice has issued an order "indicat[ing]" that the "United States should take all measures at its disposal to ensure that

Walter LaGrand is not executed pending the final decision in these [ICJ] proceedings."

The Solicitor General has filed a letter in which he opposes any stay. In his view, the "Vienna Convention does not furnish a basis for this Court to grant a stay of execution," and "an order of the International Court of Justice indicating provisional measures is not binding and does not furnish a basis for judicial relief." The Solicitor General adds, however, that he has "not had time to read the materials thoroughly or to digest the contents."

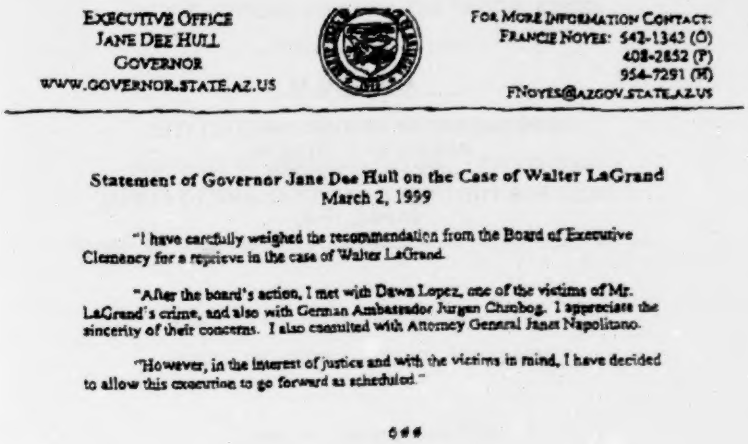
Germany's filings come at what is literally the eleventh hour. Nonetheless, Germany explains that it did not file its case in the International Court of Justice until it learned that the State of Arizona had admitted that it was aware, when LaGrand was arrested, that he was a German national. That admission came only eight days ago, and the ICJ issued its preliminary ruling only today. Regardless, in light of the fact that both the International Court of Justice and a sovereign nation have asked that we stay this case, or "indicate[d]" that we should do so, I would grant the preliminary stay that Germany requests. That stay would give us time to consider, after briefing from all interested parties, the jurisdictional and international legal issues involved, including further views of the Solicitor General, after time for study and appropriate consultation.

The Court has made Germany's motion for a preliminary stay moot by denying its motion to file its complaint and "declin[ing] to exercise" its original jurisdiction in light of the "tardiness of the pleas and the jurisdictional barriers they implicate." It is at least arguable that Germany's reasons for filing so late are valid, and the jurisdictional matters are arguable. Indeed, the Court says that it is merely "*doubtful* that Art. III, § 2, cl. 2 provides an anchor" for the suit and that a foreign government's ability to assert a claim against as State is "without *evident* support in the Vienna convention and in *probable* contravention of Eleventh Amendment principles" (emphasis added). The words "doubtful" and "probable," in my view, suggest a need for fuller briefing.

For these reasons I would grant a preliminary stay.

Annex MG 33

STATEMENT OF GOVERNOR JANE DEE HULL ON THE CASE OF *WALTER LAGRAND* (2 MARCH 1999)



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Statement of Governor Jane Dee Hull on the Case of Walter LaGrand
March 2, 1999

"I have carefully weighed the recommendation from the Board of Executive Clemency for a reprieve in the case of Walter LaGrand.

"After the board's action, I met with Dawn Lopez, one of the victims of Mr. LaGrand's crime, and also with German Ambassador Jurgen Chrobog. I appreciate the sincerity of their concerns. I also consulted with Attorney General Janet Napolitano.

"However, in the interest of justice and with the victims in mind, I have decided to allow this execution to go forward as scheduled."

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Annex MG 34

SUPREME COURT OF THE UNITED STATES,
PARAGUAY V. *GILMORE*,
BREARD V. *GREENE*,
BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*
(APRIL 1998)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

No. 97-1390 (A-738)

REPUBLIC OF PARAGUAY, ET AL., PETITIONERS

v.

JAMES S. GILMORE, III, GOVERNOR OF VIRGINIA, ET AL.

No. 97-8214 (A-732)

ANGEL FRANCISCO BREARD, PETITIONER

v.

FRED W. GREENE, WARDEN

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States in these cases.

STATEMENT

1. These cases principally involve questions concerning the application in domestic courts of the United States of Article 36 of the Vienna Convention on Consular Relations, April

24, 1963, 21 U.S.T. 77, 100-101. Petitioners also seek to implicate Article XII of the Treaty of Friendship, Commerce, and Navigation (FCN) between the United States and the Republic of Paraguay, Feb. 4, 1859, 12 Stat. 1092.

Article 36(1)(b) of the Vienna Convention, 21 U.S.T. at 100-101, provides:

> With a view to facilitating the exercise of consular functions relating to nationals of the sending State: * * *
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forward by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph[.] * * *

In bilateral consular conventions with several nations, the United States has agreed to the effect that "[a] consular officer [of the sending state] shall be informed immediately by the appropriate authorities of the territory when any national of the sending state is confined in prison awaiting trial or is otherwise detained within his district." Consular Convention, June 6, 1951, United States-United Kingdom, 3 U.S.T. 3426; see also 97-1390 Pet. App. A38-A39 (similar; consular conventions with USSR and China). Although Paraguay is not party to any such bilateral agreement with the United States, it contends that its consular officers are also entitled to mandatory notification of a Paraguayan national's arrest in the United States pursuant to

Article XII of the FCN Treaty, which provides that "[t]he diplomatic agents and consuls of the Republic of Paraguay in the United States of America shall enjoy whatever privileges, exemptions, and immunities are or may be there granted to agents of any other nation whatever."

2. On August 17, 1992, Petitioner Breard was arrested by Arlington County, Virginia, police for attempted rape. Further investigation led the police to connect Breard with the earlier murder and attempted rape of Ruth Dickie in February 1992. Although Breard is a citizen and national of Paraguay, neither Arlington nor Virginia authorities advised him, at any point before his trial, of any right to have the Paraguayan consulate informed of his arrest. Nor did Arlington or Virginia authorities inform the Paraguayan consulate that Breard had been arrested. 97-1390 Pet. App. A3.

After a jury trial in the Circuit Court for Arlington County, Breard was convicted of capital murder and attempted rape and was sentenced to death. The conviction and sentence were affirmed by the Virginia Supreme Court on direct review, and this Court denied certiorari in 1994. 97-1390 Pet. App. A3-A4. Breard also pursued collateral review of his conviction and sentence in the Virginia state courts, unsuccessfully; the Virginia Supreme Court denied his petition for leave to appeal in January 1996. Id. at A4. At no point in his trial, his initial appeal, or his state collateral proceedings did Breard raise a claim that state authorities had violated the Vienna Convention by failing to inform him of a right to have the consulate informed of his arrest. Ibid.

3. At some point after the Virginia Supreme Court's denial of review of Breard's collateral challenge to his conviction, diplomatic and consular representatives of the Republic of Paraguay became aware of Breard's conviction and sentence and sought to confer with Breard, as provided for by the Vienna Convention. Once that request was made, Virginia authorities agreed, and since that time Paraguayan officials have been granted free access to Breard, in conformity with the Convention. 97-1390 Pet. App. A4.

4. In April 1996, Breard filed a petition for a writ of habeas corpus in federal district court, contending for the first time that his conviction and sentence were invalid because of Virginia's failure to comply with the Vienna Convention. The district court held that federal review of that claim on habeas corpus was barred by Breard's procedural default in failing to raise the claim in state court. 97-8124 Pet. App. 23. The court of appeals agreed. 97-1390 Pet. App. A27-A30. The court further concluded that Breard had not shown cause that might excuse his procedural default, and in particular, that Breard had not shown that "the factual basis for his Vienna Convention claim was unavailable" at the time of his trial. Id. at A30. The court also found no potential "miscarriage of justice" to excuse the procedural default, noting that no reasonable juror could

have found that Breard was actually innocent of the crime or not eligible for the death penalty. Id. at A30-A31.

5. In September 1996, the Republic of Paraguay, the Ambassador of Paraguay, and the Paraguayan Consul General filed a complaint in federal district court, seeking a declaration that Virginia authorities had violated the Vienna Convention and the FCN Treaty with Paraguay, a declaration that Breard's conviction was void because of those alleged violations, and an injunction requiring vacatur of Breard's conviction. 97-1390 Pet. App. A55. The plaintiffs asserted two causes of actions based directly on the Convention and the FCN Treaty; the Consul General also asserted a cause of action under 42 U.S.C. 1983, based on the alleged deprivation of the Consul General's asserted right (under the FCN Treaty) to be informed of Breard's arrest and his asserted right (under the Vienna Convention) to have Breard informed of his own right to have the consular post informed of his arrest. 97-1390 Pet. App. A52-A54.

The district court dismissed the complaint for lack of subject-matter jurisdiction, based in large part on its conclusion that the action was barred by the Eleventh Amendment. The district court noted that the complaint did not allege that the state defendants continue to refuse to allow consular officials to give Breard assistance; "[n]ow that defendants have given Paraguayan officials access to Mr. Breard, they are no longer in violation of the treaties." 97-1390 Pet. App. A17-A18.

The court of appeals likewise held that Paraguay's action was barred by the Eleventh Amendment. The court concluded, centrally, that the action did not fall within the exception to the States' Eleventh Amendment immunity from suit for injunctions against continuing violations of federal law, recognized in Ex parte Young, 209 U.S. 123 (1908), because "the violation [of the treaties] alleged here is not an ongoing one * * * [and] the essential relief sought is not prospective." 97-1390 Pet. App. A8-A9. The court agreed with respondents that "there is no ongoing violation of Paraguay's rights * * * because Paraguay is presently on notice of Breard's situation and [Virginia] is not now preventing Paraguay from giving whatever aid and counsel to Breard it desires." Id. at A9. The court emphasized that "the actual violation alleged is a past event that is not itself continuing," ibid., and it distinguished various cases relied on by Paraguay as involving "examples of presently experienced harmful consequences of past conduct, hence of ongoing violations of federally protected constitutional rights," id. at A9-A10. By contrast, the court concluded, the relief sought in this case "is quintessentially retrospective: the voiding of a final state conviction and sentence. * * * [I]ts effect would be to undo accomplished state action and not to provide prospective relief against the continuation of the past violation." Id. at A11.

6. The Department of State is the agency of the federal government with lead responsibility for issues arising under the Vienna Convention, including Article 36. The Department

historically has issued periodic guidance to law enforcement officials about the requirements of consular access and notification, to further compliance with Article 36 by such officials. In addition, the State Department works with foreign consular officials and federal, state, and local law enforcement officials in the United States to address issues of non-compliance when they arise. In January 1998, the State Department issued a new publication, Consular Notification and Access, which provides comprehensive guidance on consular notification and access requirements, and in February 1998 it began distributing to law enforcement officials a pocket card setting forth the basic requirements for notification in cases of arrest and detention of foreign nationals.[1]

Some time after April 18, 1996, the United States Department of State received official notice of Breard's case through a diplomatic note of that date from the Embassy of Paraguay. That diplomatic note did not allege a breach of the Vienna Convention, but it did request the State Department's assistance in facilitating efforts to obtain information about the case from Virginia and in arranging a visit at the place of Breard's detention. Such assistance was provided. On June 4, 1996, the Department forwarded to the Governor of Virginia appeals for clemency that were received by the United States Embassy in

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[1] That brochure is the State Department's most definitive statement on how consular notification and access obligations should be honored by law enforcement officials. A copy of the brochure has been lodged with the Clerk.

Paraguay. On October 15, 1996, State Department representatives discussed the case at a meeting with representatives of Paraguay and its counsel. On December 10, 1996, the Assistant Secretary of State received a request from the Paraguayan Ambassador for assistance in obtaining a new trial for Breard.

Because of the State Department's responsibilities relating to U.S. compliance with Article 36 of the Vienna Convention, and because the Department considered it important to address Paraguay's concerns seriously in diplomatic channels, the State Department decided to undertake an investigation of the case. The Department reviewed the critical portions of the trial transcript, including Breard's testimony, and an affidavit from Breard's defense attorneys concerning their efforts on his behalf. That review persuaded the Department, critically, that Virginia authorities' failure to comply with Article 36 of the Convention prior to trial did not affect the outcome of Breard's trial or sentencing proceeding. In particular, the Department concluded that Breard had had the kinds of assistance that consular officers generally seek to ensure. The State Department came to the following specific conclusions, among others:

> Breard had almost immediate and thereafter continuing contact with his family, who were involved in his defense;
>
> Breard could not have been ignorant of American culture, as he had lived in this country since 1986 and had been married briefly to a United States citizen;

Breard had a good command of English and therefore would not have needed consular assistance in interpretation;

Breard was ably represented by criminal defense attorneys experienced in death penalty litigation, who worked closely with his family, some of whom traveled from Paraguay to assist in the defense;

Breard decided to plead not guilty and to testify at his trial contrary to the competent advice of his attorneys, who were far better able to explain the U.S. legal system to him than any consular officer would have been;

Breard's mother, who was also Paraguayan, understood that Breard's decision to plead not guilty and to testify was a strategic error and advised him not to do what he did, and so it was implausible that cultural misunderstandings accounted for his decision;

The evidence at trial demonstrated that Breard unquestionably committed the crime, and that the jury and judge could easily have imposed the death penalty even if Breard had not testified, given ample evidence that the murder was "aggravated" within the meaning of Virginia law; and

Breard had the full protection of the criminal justice system.

See App. A, infra, 33-38 (record of April 7, 1998, proceeding before International Court of Justice; United States' submission).

On July 7, 1997, after the State Department's review of the Breard case was completed, the Department reported its conclusions, including many of the above-mentioned facts, to the Paraguayan Ambassador. The Department expressed "deep regret" that Breard apparently had not been advised of his right to have consular authorities informed of his arrest and detention, as required by the Convention. The Department also advised, however, that it had found no basis for concluding that consular assistance would have altered the outcome of Breard's trial. The Department nevertheless invited Paraguay to call additional relevant information to its attention. App. A, _infra_, at 38; App. B, _infra_ (correspondence between Paraguayan Ambassador and State Department). The Embassy of Paraguay neither responded officially to the Department's letter nor attempted to address the Department's analysis or conclusions.

The Department has intensified its efforts to ensure that federal, state, and local law officials in the United States are aware of and comply with the consular notification and access requirements of the Vienna Convention. The Department has issued new comprehensive guidance on the subject, which has been personally provided by the Secretary of State to the Governor of every State of the United States (a copy of that guidance has been lodged with the Clerk). This guidance and a pocket-sized reference card for law enforcement officers to carry on the street have also provided to the Attorney General of every State. The State and Justice Departments have also begun to conduct briefings on the requirements of consular notification and access for prosecutors and law enforcement officials, focusing initially on areas with high concentrations of foreign nationals. App. A, infra, 38-39.

7. On March 30, 1998, the Government of Paraguay officially notified the United States that, unless the United States could stay Breard's execution and engage in consultations, it would file suit in the International Court of Justice (ICJ) on April 3, seeking an order that the execution be stayed. We are informed that the Department of State agreed to consultations and made a request through counsel to the Governor of Virginia, on behalf of the Secretary of State, requesting that Virginia stay Breard's execution. After consultation with the Governor, counsel for the Governor replied that Virginia was not at that time prepared to grant the Department's request, in part because of the pendency of these cases before this Court. We are informed that the State Department advised the Government of Paraguay of the Governor's response on the following morning.

On April 3, 1998, Paraguay filed an application with the International Court of Justice (ICJ), requesting a declaration from that court that the United States had violated Article 36 of the Vienna Convention by failing to inform Breard of his right to have the Paraguayan Consulate notified of his arrest, and an order directing the reestablishment of the "status quo" before that violation, including vacatur of Breard's conviction. See 97-8214 Supplemental Brief in Support of Application for a Stay of Execution, Exh. B. Paraguay requested the ICJ to indicate provisional measures pending the outcome of the case. Ibid. On April 7, 1998, the ICJ heard oral arguments on Paraguay's request for the indication of provisional measures. On April 9, 1998, the ICJ issued an order, indicating that the United States "should take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings." Id. Exh. C, ¶ 41 (ICJ order).

On April 9, 1998, the Legal Adviser to the Department of State wrote to the Governor of Virginia, bringing the order of the ICJ to his attention. The Legal Adviser requested that the Governor give consideration to the ICJ's indication of provisional measures. App. C, infra (letter from Legal Adviser to Governor). The Secretary of State is also requesting that the Governor of Virginia stay Breard's execution, in light of the ICJ's order indicating provisional measures. App. F, infra.

DISCUSSION

The United States takes very seriously both the obligations embodied in the Vienna Convention on Consular Relations and instances of violations of those obligations. In this case, the Executive Branch has conceded that the Vienna Convention was violated insofar as it required that Breard be notified that he could have the assistance of a consular officer. But the Executive Branch has also concluded that there was no affirmative interference in Breard's ability to consult with Paraguayan consular officials (his family or his attorney could have done so at any time) and that there is no basis for concluding that the assistance of a consular officer would have changed the outcome of the criminal proceedings. It has ascertained that the essential kinds of assistance that consular notification is intended to ensure were, in fact, provided to Breard notwithstanding the failure of notification. It has also determined that the remedy Paraguay seeks is not supported by the Convention's text, its negotiation history, or the subsequent practice of state parties. In view of these considerations and the fact that a consular officer has no obligation to provide any particular level of services, the Executive Branch has concluded that Paraguay's claim as to the relevance of consular notification in Breard's case are speculative and unpersuasive, and that there is in any event no basis for requiring the undoing of the lawfully imposed sentence of the courts of Virginia. The State Department has accorded Paraguay the traditional remedy among nations for failures of consular notification: it has investigated the facts, determined that there was a breach, formally apologized on behalf of the United States, and undertaken to improve future compliance.[3]

Moreover, notwithstanding the importance of the Vienna Convention, we also believe that the Convention does not provide a judicial cause of action, at the behest of either a foreign national or his sending state, to have a criminal conviction or sentence vacated, either on direct appeal or on a collateral proceeding. That construction of Article 36 of the Convention by the State Department, which is responsible for its implementation, is "entitled to great weight." United States v. Stuart, 489 U.S. 353, 369 (1989). There is no indication in the text or negotiating history of the Convention, or in its implementation by contracting states, that a violation of Article 36 could vitiate an otherwise valid conviction, and such a result would be inconsistent with the inherently discretionary nature of consular relations. Furthermore, this Court has never addressed whether any remedy should be available in a criminal case for a violation of Article 36, and it would be inappropriate for this Court to decide that issue for the first time in the context of a collateral habeas corpus proceeding, especially where the issue was not raised at trial or the initial appeal. This Court should therefore deny the certiorari petitions as well as petitioners' related motions for relief under the Court's original jurisdiction.

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[3] The State Department is aware of no State of the United States that takes the official position that it is not required to honor the obligations of Article 36. Suggestions to the contrary by Paraguay and Breard have been considered by the Department and found to be unwarranted. The Department of State would address any evidence of deliberate noncompliance brought to its attention.

I. NEITHER PARAGUAY NOR ITS OFFICIAL REPRESENTATIVES HAVE A CAUSE OF ACTION THAT WOULD AFFORD A JUDICIAL REMEDY IN DOMESTIC COURTS OF VACATUR OF A CRIMINAL CONVICTION OF A PARAGUAYAN NATIONAL

A. Paraguay May Not Proceed Under the Vienna Convention

1. a. Although the court of appeals disposed of Paraguay's action on Eleventh Amendment grounds, the United States' principal concern here is with the Convention itself. Specifically, the important question for the United States is whether the Convention provides a judicial cause of action or remedy in domestic courts, at the behest of a sending state or its representatives, to obtain the vacatur of a conviction on the basis of the past failure of authorities to inform an arrested national of the sending state of his right to have his consular representative informed of his arrest. That question must be distinguished from the entirely different question whether a sending state such as Paraguay (or an arrested foreign national) might have recourse to the courts for an order directing cessation of an ongoing refusal of authorities to allow consular notification or access, as guaranteed by the Convention.[3] Thus, while we do not necessarily endorse the court of appeals' distinction between "past" and "ongoing" violations of the Convention for Eleventh Amendment purposes in this setting, we do

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[3] This case also does not raise any questions concerning the ability of the United States to sue in order to enforce compliance with the Vienna Convention. See United States v. Arlington County, 669 F.2d 925 (4th Cir.), cert. denied, 459 U.S. 801 (1982).

agree that Paraguay and its representatives were properly denied the judicial relief that they seek.

In answering that question with respect to Paraguay's suit, we start from the presumption, articulated by this Court in The Head Money Cases, 112 U.S. 580 (1884), that "[a] treaty is primarily a compact between independent nations. It depends for the enforcement of its provision on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamation, so far as the injured parties choose to seek redress. * * * It is obvious that with all this the judicial courts have nothing to do and can give no redress." Id. at 598; see also Charlton v. Kelly, 229 U.S. 447, 474 (1913); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 306 (1829) ("The judiciary is not that department of the government, to which the assertion of its interest against foreign powers is confided."). This Court has consistently stated that the power to determine whether the United States has, or has not, acted in accordance with a treaty's obligations to a foreign nation "ha[s] not been confided to the judiciary, which has no suitable means to exercise it, but to the executive and legislative departments of our government; and that they belong to diplomacy and legislation, and not to the administration of the laws." Whitney v. Robertson, 124 U.S. 190, 194-195 (1888).

These considerations are the appropriate ones in the circumstances of this case, where the United States has addressed

Paraguay's concerns in diplomatic channels. It is not unusual for a treaty to "only set forth substantive rules of conduct * * * [and] not create private rights of action * * * [that would permit suit] in United States courts." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 442 (1989). While in some circumstances parties to a treaty may intend that there be judicial enforcement of its provisions, such judicial remedies are generally reserved for treaties "which are capable of enforcement as between private parties in the courts of the country," *Head Money Cases*, 112 U.S. at 598, and not when one nation challenges the governmental conduct of another. Thus, for example, treaties "which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance" may be invoked by aliens in domestic courts as controlling law. *Ibid.*

This case, however, involves a claim by a foreign government that a State of the United States should be prevented by domestic courts from carrying out its sovereign authority to enforce the sentencing judgment of its criminal courts, notwithstanding the view of the Executive Branch that such a remedy is unwarranted. Such a claim is extraordinary, and could be recognized only if there were clear evidence that the parties to the Vienna Convention had intended such a judicial remedy to be available.[4]

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[4] It is important to distinguish the question whether the Vienna Convention creates a judicial remedy for Paraguay from the question whether the Convention is "self-executing." The United States agrees that the Vienna Convention is self-executing, in

(continued...)

b. (i) In construing a treaty, as in construing a statute, the Court looks first to its terms to determine its content. *United States* v. *Alvarez-Machain*, 504 U.S. 655, 663 (1992). Nothing in the text of the Convention provides that past violations of Article 36 are to be remedied through judicial actions by sending states or their nationals to vacate criminal convictions. Article 36(1)(b) does state that arresting authorities are to inform an arrested foreign national of "his rights" to have a consular post informed of his arrest or detention, but this case does not involve an attempt to enforce those rights presently; neither Paraguay nor Breard is seeking to

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*(...continued)
the sense that it can be implemented by government officials without implementing legislation. That issue is distinct from the question whether the Convention creates enforceable rights that may be raised and adjudicated in a particular judicial setting. See, *e.g.*, *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1298-1299 (3d Cir. 1979); *Dreyfus* v. *Von Finck*, 534 F.2d 24, 29-30; *United States* v. *Bent-Santana*, 774 F.2d 1545, 1550 (11th Cir. 1985). Further, in this case, there is an important distinction between the availability of a cause of action to obtain consular notification (or to prevent ongoing interference with the right to obtain such notification) and the existence a cause of action to vacate a criminal conviction and sentence based on a prior failure of consular notification. See generally *Restatement (Third) of the Foreign Relations Law of the United States* § 111, cmt. h ("Whether a treaty is self-executing is a question distinct from whether the treaty creates private rights or remedies."); *id.* § 907, cmt. a ("International agreements, even those directly benefitting private persons, generally do not create private rights or provide for a private cause of action in domestic courts, but there are exceptions with respect to both rights and remedies."); C. Vasquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695, 719-722 (1995) (right of action question "is analytically distinct from the 'self-execution' concept").

have the Paraguayan consulate informed of his arrest.[3] Similarly, although Article 36(1)(c) states that consular officers "shall have the right to visit a national of the sending State who is in prison," no current interference with that right is at issue here, for Virginia has afforded Paraguayan officials access to Breard. Article 36(2) further states: "The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving state, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended." As we have just explained, however, enforcement of "the rights accorded under this Article" (Article 36) is not the object of this litigation.

(ii) The negotiating history of the Convention also gives no indication that the contracting parties intended that the Convention itself would mandate that a failure of consular notification would affect the validity of a criminal conviction or would permit a sending state to obtain an injunction against the execution of a criminal sentence in a receiving state. Cf. Alvarez-Machain, 504 U.S. at 665 (considering negotiating history of U.S.-Mexico extradition treaty). The initial draft of Article 36 was based on a proposal of the International Law Commission.

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[3] It is also noteworthy that the parties to the Convention expressly "realiz[ed] that the purpose of [consular] privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States." 21 U.S.T. at 79.

which would have required that countries automatically notify the relevant consulate whenever an alien was arrested. Several delegations (including the United States delegation) opposed that requirement, emphasizing that mandatory notification in all cases would impose an obligation beyond the capacity of many receiving countries to fulfill, given the large number of aliens residing in or visiting those countries, and that mandatory notification might be contrary to the wishes of some arrested persons, who might not want their consular post to be informed of their arrest. App. D, *infra* (Volume I, Official Records, United Nations Conference on Consular Relations, Vienna, 4 March--22 April 1963) at 336-337. Other delegates, however, felt that, to protect the consular function, consular authorities should always be informed of their nationals' arrests, without the need for an express invocation of the right to such notification by the arrested national. Originally, proposals to make consular notification dependent on a request by the arrested person were rejected. *Id.* at 342. A month later, however, the Conference reconsidered Article 36, and accepted both a 17-power amendment to make notification of the consular post dependent on the request of the arrested individual, and an amendment submitted by the United Kingdom requiring that an arrested alien be informed of his right to have consular notification made. *Id.* at 82-87.

The Vienna Conference was well aware that aliens might frequently find themselves subject to other countries' criminal processes, especially in countries "which had large numbers of resident aliens or which received many tourists and visitors." App. D, *infra*, at 82, ¶ 62 (Egyptian delegate). In light of the potential burden of consular notification on receiving countries, the compromise eventually adopted was intended to ensure "that the authorities of the receiving State would not be blamed if, owing to pressure of work or to other circumstances, there was a failure to report the arrest of a national of the sending State." *Ibid.* Given the concerns expressed about burdens on receiving countries, it is difficult to believe that the Conference would have accepted a proposal that would have led to invalidation of criminal convictions. And, in fact, no such proposal was advanced, much less adopted.[4]

(iii) The practice of other contracting states in implementing the Convention also gives no indication that a violation of Article 36 may be remedied through judicial vacatur of a conviction. Cf. *Alvarez-Machain*, 504 U.S. at 665. Throughout the two-year period in which the Department of State and the Embassy of Paraguay have been discussing Breard's case, Paraguay has failed to identify a single country that would grant the remedy that Paraguay seeks from the United States courts. Moreover, when Breard's case came to the attention of the State Department, the Department made inquiries to all United States embassies worldwide, and through them, to foreign countries, as to the availability of remedies for the failure of governments to comply with Article 36. Although the results of that survey remain incomplete, the survey also did not reveal a single instance in which a foreign country had provided a status quo ante remedy of vacating a criminal conviction for a failure of consular notification (at the behest of either the arrested foreign national or his government). See App. A, infra, at 32. Our legal research has revealed only one case abroad in which that claim was even considered, and it was rejected on the grounds that, under the Convention, consular authorities had only a "complementary and subsidiary" power to assist the accused in obtaining legal counsel, and that the accused in that case had legal counsel (which is also true of Breard). See App. E, infra (excerpt and discussion of Re Yater, 77 I.L.R. 541-542 (Italy, Court of Cassation 1973)).

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[4] Indeed, some delegates objected even to the adopted compromise on the ground that "[t]he convention was concerned with consular privileges and immunities and not with national laws," and that "[n]o receiving State could admit interference in its internal judicial affairs." App. D, *infra*, at 84, ¶ 81 (Romanian delegate).

(iv) Finally, the absence of any judicially enforceable remedy of vacatur is not surprising given the nature of the interests at stake. The Convention does not make consular assistance essential to the host country's criminal justice system, and there is no reason why criminal proceedings cannot continue without the presence of a consular officer. Consular officers do not act as attorneys for their nationals in the United States, nor do American consular officers act as attorneys for United States citizens in foreign courts. Moreover, consular officers have broad discretion to determine how they will discharge their function, once they are informed of a national's arrest; they may do nothing at all, or they may simply see to it that the arrested national has competent counsel (which Breard had) and contact with his family (which Breard also had). It would be wrong automatically to vacate a criminal conviction based on a lack of consular notification, given that such notification might have resulted in no essential (or even significant) consular assistance at all. And there is no workable way to determine whether consular notification would have made a difference at a defendant's trial, given the inviolability of consular archives and the privileges and immunities of consular officers. Furthermore, compliance with Article 36 varies widely worldwide, and violations of the obligation to inform arrested nationals of their right to consular notification are perhaps inevitable, given the large numbers of persons who reside in and visit countries other than their own. It is difficult to believe that the contracting parties to the Vienna Convention would have agreed to Article 36 if they had anticipated that lapses in adherence to the notification requirement would vitiate the results of their domestic criminal justice systems.

2. Paraguay has relied on Santovincenzo v. Egan, 284 U.S. 30 (1931), Wildenhus's Case, 120 U.S. 1 (1887), and Glass v. The Sloop Betsey, 3 U.S. (3 Dall.) 6 (1794), for the proposition that a foreign consul may seek enforcement of his rights in the courts of the United States (97-1390 Pet. 8 n.1). Those decisions,

however, do not support the proposition that Paraguay has a judicially enforceable remedy under the Vienna Convention to vacatur of a criminal conviction or sentence.

In Santovincenzo, the Court held that the Consul General of Italy was entitled, by operation of a bilateral treaty with the United States, to take possession of the assets of an Italian national, domiciled in the United States, who had died in New York intestate and without identified heirs. The question in that case was not whether the treaty provided the Italian Consul with a right of access to the courts, for under New York law, the decedent's estate was submitted to the courts for administration as a matter of course, pursuant to established state law procedures. The Italian Consul appeared in court as would any private party claiming a distribution from the estate, and such distributions were inherently likely to occur in probate court. The only issue to be decided in Santovincenzo was whether the treaty had given Italy a particular substantive right. See id. at 34-38.

In The Sloop Betsey, the Court rejected the contention, made by a French privateer who had captured a Swedish ship and brought it to Baltimore as prize, that the district court lacked admiralty jurisdiction to determine rights in the ship because exclusive jurisdiction (it was contended) lay only with French authorities. See 3 U.S. (3 Dall.) at 8-9 (argument of counsel). The Court, sua sponte, inquired of the parties whether French consuls in the United States might exercise prize jurisdiction over captured ships brought here by French parties, in the absence of a treaty expressly providing for such jurisdiction, and answered that question in the negative. Id. at 15-16. The Court did not suggest that a French consul might invoke the jurisdiction of the federal courts in the first instance to have that question answered. The case was initiated in district court by a private libellant, pursuant to the customary manner of invoking admiralty jurisdiction by private parties. Id. at 6 (statement of case).

In Wildenhus's Case, the Court concluded that the Belgian Consul might rely on federal statutory provisions governing the writ of habeas corpus to vindicate his asserted right, under a bilateral convention with the United States, to exclusive jurisdiction over merchant seamen. 120 U.S. at 17. That convention and similar ones, however, were intended to curtail domestic criminal jurisdiction over aliens in certain circumstances. Id. at 14-16. Thus, although Belgium's substantive argument was ultimately rejected in that case, it was not difficult to conclude that the treaty provided the Belgian Consul with a judicial remedy to prevent New Jersey's allegedly unlawful interference with his exclusive jurisdiction and usurpation of jurisdiction over his charges. Nothing in the Vienna Convention confers a corresponding right on the consul of a foreign nation to obtain custody of one of its nationals who is detained by authorities in the receiving state; to the contrary, the Convention plainly contemplates that the alien will remain in the custody of domestic authorities, in accordance with its laws.

Accordingly, no decision of this Court suggests that consular officials may sue in our domestic courts for a remedy for a past violation of rights afforded to consuls under a treaty, much less for vacatur of a criminal conviction. Whereas Santovincenzo and Wildenhus's Case did recognize, in certain circumstances, the possibility that consuls would be able to present their interests, secured by treaties, in courts, both of those cases involved treaties that were inherently directed at judicial proceedings (in Santovincenzo, probate proceedings, and in Wildenhus's Case, local criminal jurisdiction). The Vienna Convention does not have a similar focus on judicial proceedings and cannot reasonably be read to grant foreign consuls a cause of action in domestic courts.

3. The decision below does not conflict with any decision of any federal court of appeals or any state court of last resort. The only other federal appellate court that has addressed whether a foreign country may obtain judicial redress for a past violation of Article 36 has, like the court of appeals in this case, found such a claim to barred by the Eleventh Amendment. United Mexican States v. Woods, 126 F.3d 1220 (9th Cir. 1997), petition for cert. pending, No. 97-1365 (filed Feb. 18, 1998).

Paraguay has pointed to Republic of Argentina v. City of New York, 25 N.Y.2d 252 (1969), in which the New York Court of

Appeals held that, as a matter of customary international law, premises owned by a foreign country and devoted to consular purposes are exempt from municipal real property taxes.[3] That case, like Santovincenzo, did not require the recognition of an affirmative cause of action in U.S. courts at the behest of a foreign country, because Argentina invoked the generally applicable forms of action available under state law to entities seeking a declaration of tax immunity. See id. at 256. Thus, Argentina was in a position no different from, for example, a charitable institution contending that its property was immune from tax under domestic law. Indeed, the New York Court of Appeals denied Argentina's request for a refund of taxes paid in the past, because it had failed to comply with the generally applicable provisions of the City's Administrative Code for such refunds. Id. at 265.

4. In sum, although Article 36 of the Vienna Convention is unquestionably of great significance to the United States government, we believe that review is not warranted of Paraguay's contention that the Vienna Convention provides it with a cause of action by which it may obtain a judicially enforceable remedy in U.S. courts -- and here, the extraordinary remedy of setting aside a criminal conviction and sentence or enjoining execution of that sentence -- for a past violation of Article 36 with respect to one of its nationals. It is most implausible that the

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[3] At the time of the decision in that case, the Senate had not yet ratified the Vienna Convention, which expressly makes consular premises exempt from municipal taxes. 25 N.Y.2d at 260.

contracting parties to the Convention intended such a remedy, and it is therefore not surprising that the decision below is not contrary to any decision of this Court, any federal court of appeals, any state supreme court, or (as far as we are aware) the court of any foreign nation.

B. Paraguay May Not Proceed Under The Treaty Of Friendship, Commerce, and Navigation

Paraguay also contends that Virginia authorities violated Article XII of the February 4, 1859, Treaty of Friendship, Commerce, and Navigation between the United States and Paraguay, 12 Stat. 1092 (FCN Treaty), when they failed to inform the Paraguayan consular post that Breard had been arrested. Article XII states that the "consuls of the Republic of Paraguay in the United States of American shall enjoy whatever privileges, exemptions, and immunities are or may be there granted to agents of any nation whatever." Ibid. Although that article does not explicitly refer to consular notification, Paraguay contends that, under Article XII's most-favored-nation clause, its consuls enjoy the right to be informed of the arrest of any Paraguayan national in the United States, because a similar right has been extended by the United States to other nations' consuls in bilateral consular conventions. See 97-1390 Pet. App. A37-A39 (consular conventions between U.S. and United Kingdom, USSR, and China).

Paraguay's argument fails on the merits. First, Article XII's reference to consular "privileges, exemptions, and immunities" does not encompass consular notification when nationals are detained, but rather is intended to ensure that the United States does not impede the performance of official consular duties through judicial process or taxation. Thus, for consular officers, "privileges, exemptions, and immunities" extended by treaty clauses have traditionally included the inviolability of consular premises and archives, immunity from civil and criminal jurisdiction for official acts, and duty-free import and export of personal property. By contrast, the United States has traditionally limited mandatory consular notification to cases where alien detainees are nationals of a country with whom the United States has a bilateral agreement specifically requiring such notification. That practice is consistent with the position taken by the United States delegate at the Vienna Conference, where that delegate suggested that consular notification should be at the election of the alien detainee rather than automatic, because some aliens might not want their consular posts to be notified of their arrest.

Second, longstanding international practice has been to require countries claiming such "conditional" most-favored-nation benefits to trigger the process by sending a diplomatic note requesting the specific treatment given to a third nation and undertaking to accord reciprocal treatment to the United States. See F. McDowell, Digest of United States Practice in International Law 256 (1975). We have been informed by the Department of State that Paraguay has made no such request.

Thus, Paraguay cannot claim the most-favored-nation right allegedly at issue here.

Even if Paraguay's argument were correct on the merits, Paraguay nonetheless would not have a judicially enforceable cause of action to vacate Breard's conviction. As with the Vienna Convention, the text of the FCN Treaty gives no indication that the contracting parties intended it to provide judicially enforceable remedies for past violations as might be relevant here, and the same is true of various other consular conventions relied on by Paraguay requiring consular notification. Nor are we aware of any negotiating history to the FCN Treaty or other consular conventions or subsequent state practice that would suggest the availability of a judicial cause of action to remedy a past violation of a foreign country's right to consular notification.

C. Paraguay's Consul General May Not Proceed Under 42 U.S.C. 1983

There remains the question whether Paraguay's Consul General in the United States has a cause of action against Virginia authorities under 42 U.S.C. 1983 to remedy their violation of his asserted right to be informed of Breard's arrest, and his asserted right that Breard be advised of his own right to have the consular post notified of the arrest. That claim cannot be sustained. As an initial matter, it is clear that Paraguay itself could not proceed under Section 1983. Section 1983 protects the "rights" of "any citizen of the United States or other person within the jurisdiction thereof" from deprivation under color of state law. Whereas a foreign country can be a "person" within the meaning of some federal statutes using that term, see Pfizer, Inc. v. India, 434 U.S. 308, 315-318 (1978) (India is a "person" within the coverage of the Sherman and Clayton Acts), Section 1983 was not intended to include sovereigns within its reach. Section 1983 was enacted to allow the enforcement by "private parties" of their civil rights against governmental actors, see Moor v. County of Alameda, 411 U.S. 693, 699 (1973), but political entities have no such civil rights. See South Carolina v. Katzenbach, 383 U.S. 301, 323-324 (1966) ("person[s]" protected by the Due Process Clause of the Fifth Amendment do not include States); cf. Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) (State not a "person" that may be sued under Section 1983). And foreign countries like Paraguay are further excluded by the plain language of Section 1983 because they are not "within the jurisdiction of the United States." Therefore, the Convention does not extend to Paraguay any "rights" enforceable against the state respondents with respect to Breard's conviction by an action brought under Section 1983.

Consul General Gonzalez, acting in his official capacity, has no greater ability to proceed under Section 1983 than does the country he represents. Any rights the Consul General might have by virtue of the Vienna Convention or the FCN Treaty exist for the benefit of Paraguay, not for him as an individual. Thus, the Consul General has not sued because he has been deprived of any rights he holds as a person, but only because the government of Paraguay is said to have certain treaty rights (such as gaining access to detained nationals), and he is the official agent of Paraguay authorized to exercise those rights. See 97-1390 Pet. App. A43 (noting that plaintiffs Ambassador and Consul General "bring this action in their official capacities as diplomatic and consular officers and on behalf of the Republic of Paraguay"). If Consul General Gonzalez were no longer the Paraguayan consul, he would have no access rights to Breard; his successor in office would have those rights, and indeed, the action under Section 1983 was brought by his predecessor in office, former Consul General Jose Antonio Dos Santos. See 97-1390 Pet. App. A43.

Moreover, like Paraguay, its official representative the Consul General is not a person "within the jurisdiction of the United States" who may bring suit under Section 1983. Consular officers have in all cases immunity for their official acts, and full diplomatic immunity when they are assigned to embassies. United States v. Wong Kim Ark, 169 U.S. 649, 678-691 (1898), is not to the contrary. Wong Kim Ark concerned the citizenship of a child born to alien parents (not a consul) in the United States. In the course of its lengthy discussion of past precedents, the Court explained that "consuls, as such, and unless expressly invested with a diplomatic character in addition to their ordinary powers, are not considered as entrusted with authority to represent their sovereign in his intercourse with foreign

States or to vindicate his prerogatives, or entitled by the law of nations to the privileges and immunities of ambassadors or public ministers, but are subject to the jurisdiction, civil and criminal, of the courts of the country in which they reside." *Id.* at 678-679. Insofar as that statement in *Hong Kim Ark* suggested that consuls may be prosecuted for their violations of domestic law (absent a treaty or other source of international law to the contrary), it is unexceptionable, but it is beside the point here. A consul may be "within the jurisdiction of the United States" in his individual capacity, but not his official capacity. Thus, if a consul were personally subject to arbitrary arrest by a state officer, he might be able to proceed on a Fourth Amendment claim under Section 1983; but he cannot use Section 1983 to vindicate the sovereign interests of the country he represents.

D. *Considerations About This Court's Original Jurisdiction*

Paraguay has suggested that a factor militating in favor of certiorari is that its petition falls within the Court's nonexclusive original jurisdiction as a "Case[] affecting Ambassadors, other public Ministers and Consuls." U.S. Const. art. III, § 2, cl. 2. Paraguay suggests that the Court should "presumptively" review cases within its original jurisdiction that arrive in the Court on petition for a writ of certiorari. 97-1390 Pet. 23. That submission is without merit.

First, although Consul General Gonzalez might be able, in some circumstances, to invoke the Court's original jurisdiction, it is far from clear that the Court would have original jurisdiction over Paraguay's own asserted causes of action. Section 1651(b)(1) of Title 28 states: "[T]he Supreme Court shall have original but not exclusive jurisdiction of * * * [a]ll actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties." That language does not include actions involving foreign nations themselves as parties. The language of Article III, Section 2, Clause 2, creating original jurisdiction over cases "affecting * * * Consuls," might be read more broadly than the statutory language (which focuses on the parties to the case rather than whom the case "affect[s]"). Nevertheless, the petition in No. 97-1390, which is in essence an action brought by Paraguay itself to have the conviction of one of its nationals set aside, rather than to protect the right of its consul as such, does not appear to be within the core of the Court's original jurisdiction, if within it at all.

Second, contrary to Paraguay's contention (Pet. 24), Article III does not indicate an intent by the Framers that any case involving the United States' treaty obligations to foreign sovereigns should presumptively be heard by *this* Court. The extension of federal judicial power in Article III, Section 2, Clause 1 to "all cases affecting Ambassadors, other public Ministers and Consuls" was likely intended for the principal purpose of ensuring that controversies potentially affecting the inviolability of ambassadors, foreign ministers, and consuls, would be heard by the federal courts, which would give due consideration to the sovereign interests of the foreign country that were at stake. "It was deemed fit and proper that the courts of the government, with which rested the regulation of all foreign intercourse, should have cognizance of suits *against* the representatives of such foreign governments." *Davis* v. *Packard*, 32 U.S. (7 Pet.) 276, 284 (1833) (emphasis added); see also *Valario* v. *Thompson*, 7 N.Y. 576, 580 (1853) (Act of Congress providing exclusive federal jurisdiction over cases to which consuls are parties "prescribes the tribunal in which a consul in this country is to be called on to answer"). The Framers did not, however, vest original jurisdiction in this Court for cases affecting foreign nations, or cases involving treaty interpretation. And Congress, by giving the district courts concurrent jurisdiction over cases to which consuls are parties, as with other federal-question cases, has concluded that as a general matter, the lower courts may dispose of cases affecting consuls, subject to this Court's exercise of its certiorari jurisdiction under its usual standards.

Third, this Court has never stated that it presumptively reviews, by certiorari, cases that would fall within its original jurisdiction. To the contrary, the Court has declined original jurisdiction over many cases precisely because those cases could be adequately handled by the lower courts. A crucial factor affecting the Court's decision to exercise its nonexclusive original jurisdiction is "whether recourse to that jurisdiction "

* * is necessary for the [invoking party's] protection." *Washington* v. *General Motors Corp.*, 406 U.S. 109, 113 (1972). In the absence of a showing that an inferior court could not afford adequate relief, "the availability of the federal district court as an alternative forum * * * suggest[s] that [the Court] remit the parties to the resolution of their controversies in the customary forum." *Id.* at 114; see also *United States* v. *Nevada*, 412 U.S. 534, 538 (1973) (per curiam) ("We seek to exercise our original jurisdiction sparingly and are particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim."). Eleventh Amendment considerations aside, there is no doubt that the lower federal courts would have had adequate means to provide redress to Paraguay, had Paraguay presented a meritorious case. Thus, the mere fact that Consul General Gonzalez might theoretically have been able to invoke the original jurisdiction of this Court is not a compelling reason for the Court to grant certiorari on Paraguay's petition.

II. PETITIONER BREARD MAY NOT, IN HIS HABEAS CORPUS PETITION, SEEK TO INVALIDATE HIS CONVICTION AND SENTENCE BECAUSE OF A PAST VIOLATION OF THE VIENNA CONVENTION.

Petitioner Breard contends (97-8214 Pet. 15-23) that he is entitled to have his capital murder conviction and death sentence vacated because of the failure of Virginia authorities to apprise him following his arrest of the right of consular notification under Article 36(1) of the Vienna Convention. There are, however, insurmountable obstacles to Breard's ability to raise that contention in a petition for a writ of habeas corpus (whether in his petition filed originally in district court or his petition for an original writ filed in this Court). The court of appeals ruled that Breard's effort to raise that claim was barred by his procedural default in having failed to raise it at trial or on direct appeal. That ruling was correct, is not in conflict with any decision of this Court or any other court of appeals, and represents a straightforward application of well-settled principles governing the writ of habeas corpus.

Moreover, for essentially the same reasons as those set forth in our discussion of the Vienna Convention -- especially the preamble to the Convention, which expresses the contracting parties' "realiz[ation] that the purpose of [consular] privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States." 21 U.S.T. at 79 -- we do not believe that Breard could obtain relief from his conviction and sentence because of a violation of the Vienna Convention even on direct appeal. The Court need not reach that question in this case, however, for it is clear that a remedy for a violation of Article 36 is not available here on habeas corpus.

A. Breard concedes (97-8214 Pet. 3) that his counsel failed to raise any claim based on an alleged violation of the Vienna Convention at trial, on direct appeal, or in the state habeas proceedings. Under this Court's well settled habeas jurisprudence, Breard's consular notification claim is procedurally defaulted and is not cognizable on federal habeas corpus in the absence of an affirmative demonstration of cause and prejudice. See Gray v. Netherland, 116 S. Ct. 2074, 2080-2081 (1996); Coleman v. Thompson, 501 U.S. 722, 729-731 (1991). In comparable circumstances, this Court has recently denied a certiorari petition and a stay request in other cases in which state prisoners have sought to litigate defaulted consular notification claims. See Murphy v. Netherland, 118 S. Ct. 26 (1997); In re Montoya, 117 S. Ct. 2476 (1997). There is no reason for a different result here.

Seeking to avoid the consequences of his failure to raise the consular notification claim in a timely fashion, Breard argues that the Vienna Convention became the "supreme law of the land" upon its proclamation by the President after advice and consent by the Senate, and therefore the judicially created doctrines of procedural default that ordinarily apply in domestic litigation are necessarily inapplicable when a violation of the Convention's consular notification provisions is alleged as a ground for relief in a criminal case. Nothing in the language of the Vienna Convention or in its negotiating history, however, suggests that United States courts may not insist that claims based on alleged violations of the Convention -- to the extent that they are cognizable at all when asserted by a criminal defendant -- be raised in a timely fashion.

Indeed, Article 36(2) expressly provides that the consular notification rights identified in Article 36(1)(b) "shall be exercised in conformity with the laws and regulations of the receiving [nation]," provided that "said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this [A]rticle are intended." The procedural requirements for orderly presentation of claims and objections to a trial court of criminal jurisdiction are surely valid "laws and regulations" of the United States with which any claim of a failure of consular notification must comply. Application of procedural default rules for failure to comply with those requirements does not interfere with the purposes of consular notification; in fact, by requiring the prompt presentation of claims of violations of Article 36, procedural default rules ensure that any violations of Article 36 will be swiftly brought to the attention of authorities and then resolved.

Without doubt, "Treaties made * * * under the Authority of the United States[] shall be the Supreme Law of the Land." U.S. Const., Art. VI, cl. 2. That is no less true of the Constitution itself, however, and yet this Court has routinely applied its procedural default jurisprudence to bar consideration in habeas corpus proceedings of claims based on alleged violations of constitutional provisions. See, *e.g.*, *Gray* v. *Netherland*, 116 S. Ct. at 2080-2081 (1996) (due process *Brady* claim barred by procedural default); *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982) (claim that defective jury instruction unconstitutionally relieved the government of its burden of proving an element of the offense barred by procedural default). The Court has also recognized the applicability of procedural default rules to alleged *Miranda* violations, to which Breard analogizes (97-8214 Pet. 6) the consular notification provisions at issue here. See *Ylst* v. *Nunnemaker*, 501 U.S. 797 (1991); see also *Wainwright* v. *Sykes*, 434 U.S. 72, 87-88 (1977) (procedural default rules applicable to voluntariness claims). There is no basis for a conclusion that a claim based on a treaty provision may not be procedurally defaulted, even though claims based upon alleged violations of specific constitutional provisions are routinely subject to the operation of procedural default rules.

Furthermore, treaty provisions, when they give rise to judicially cognizable rights, are regarded "as equivalent to an act of the legislature." *Foster* v. *Neilson*, 27 U.S. (2 Pet.) at 314. This Court has noted that "the established rule with respect to nonconstitutional [*i.e.*, statutory] claims" is that they are cognizable on habeas only if thealleged error "constituted a fundamental defect which inherently results in a complete miscarriage of justice." Reed v. Farley, 512 U.S. 339, 354 (1994) (internal quotation marks omitted). As we discuss further below, Breard has not shown a miscarriage of justice in his case; accordingly, it is doubtful his treaty claim is cognizable on habeas at all.

B. Breard contends (97-8214 Pet. 20-23) that his procedural default should be excused. A procedurally defaulted claim such as Breard's is reviewable on federal habeas only if the petitioner "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. at 750. Breard claims he had cause for not earlier raising a claim based on a Vienna Convention treaty provision that has continuously been in effect since 1969 because the claim "was so novel that its legal basis was not reasonably available" until a reported Fifth Circuit opinion in 1996. 97-8214 Pet. 20-21 (citing Faulder v. Johnson, 81 F.3d 515 (5th Cir.), cert. denied, 117 S. Ct. 487 (1996)). Cause for a procedural default may be found "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel" at the time of the state proceedings. Reed v. Ross, 468 U.S. 1, 16 (1984). The "question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all." Smith v. Murray, 477 U.S. 527, 537 (1986).[6]

Breard's argument based on the novelty of his claim, however, indicates that his claim is a "new rule" not cognizable on habeas under Teague v. Lane, 489 U.S. 288 (1989). Teague holds that a procedural rule is "new" and generally unavailable on habeas unless "a state court considering the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution." Lambrix v. Singletary, 117 S. Ct. 1517, 1524 (1997) (punctuation omitted). Accord O'Dell v. Netherland, 116 S. Ct. 1969, 1574-1576 (1996); Goeke v. Branch, 115 S. Ct. 1257 (1995) (per curiam); Caspari v. Bohlen, 510 U.S. 383 (1994); Graham v. Collins, 506 U.S. 461 (1993). The courts of appeals have agreed that a claim so novel as to provide cause under Reed is also a new rule that cannot be raised on habeas under Teague. See Gacy v. Welborn, 994 F.2d 305, 311 (7th Cir.)

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[6] In our view, Breard cannot satisfy this standard because (as the court of appeals noted) the Convention has been in effect since 1969, is published at 21 U.S.T. 77, has been mentioned in several reported decisions, and therefore would have been found upon a reasonably diligent search by competent counsel. See also Murphy v. Netherland, 116 F.3d 97, 100 (4th Cir.) (collecting Vienna Convention cases), cert. denied, 118 S. Ct. 26 (1997). Breard contends, however (97-8214 Pet. 22), that state officials "ignored their legal duty" under the Vienna Convention and thereby "effectively 'concealed'" the treaty from defense counsel. This case bears no resemblance to Amadeo v. Zant, 486 U.S. 214, 224 (1988), where state authorities concealed a "handwritten, unsigned, unstamped, and undesignated" memorandum that was not "intended for public consumption." Here, unlike in Amadeo, the provision upon which petitioner relies has been on the public books for more than a quarter-century.

(en banc) ("Any claim sufficiently novel that it was unavailable during the state proceedings must be a 'new rule' under *Teague*"), cert. denied, 510 U.S. 899 (1993); *Selvage* v. *Collins*, 975 F.2d 131, 136 (5th Cir.) ("[A] rule found novel for cause purposes will not be available in a federal habeas proceeding, and * * * a determination that a rule will be applied precludes a finding that the claim's novelty constitutes cause"), cert. denied, 508 U.S. 952 (1993); *Hopkinson* v. *Shillinger*, 888 F.2d 1286, 1290 (10th Cir. 1989) (en banc) ("[A] holding that a claim is so novel that there is no reasonably available basis for it, thus establishing cause, must also mean that the claim was too novel to be dictated by past precedent"), cert. denied, 497 U.S. 1010 (1990).

This Court has never decided whether there should be any remedy in a criminal case for a violation of Article 36, and it would be inappropriate to decide that issue for the first time on habeas corpus. The Court has emphasized that the availability of habeas corpus "serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with *established* [federal] standards." *Teague*, 489 U.S. at 306 (emphasis added; internal quotation marks omitted). But in this and other criminal proceedings involving foreign nationals, courts have conducted their proceedings in reliance on the present state of the law, which does not dictate any remedy for a violation of Article 36. "The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision," ibid., counsels against recognition of a substantial and dramatic new rule of criminal procedure based on the Vienna Convention (such as suppression of evidence or, as petitioner evidently requests, complete vitiation of the criminal trial) in a collateral proceeding.[7]

Nor could Breard's consular notification claim, if judicially recognized as a basis for vacating an otherwise valid and final criminal conviction and sentence, qualify for retroactive application on habeas corpus under Teague's exception for newly declared "watershed" legal rules. Although "the precise contours of this exception may be difficult to discern," Saffle v. Parks, 494 U.S. 484, 495 (1990), the Court stated that (1) a qualifying procedural rule "must not only improve accuracy, but [must] alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding," Sawyer v. Smith, 497 U.S. 227, 242 (1990) (emphasis and internal quotation marks omitted); (2) the right of the accused to counsel in all criminal prosecutions for serious criminal offenses represents "the paradigmatic example" of a "watershed" procedural rule under

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[7] Breard does not argue, and clearly cannot show, that holding him to his procedural default would constitute a miscarriage of justice. The court of appeals noted that petitioner Breard is not "actually innocent of the offense he committed or innocent of the death penalty in the sense that no reasonable juror would have found him eligible for the death penalty." 97-1390 Pet. App. A30-A31. To the contrary, his guilt was established not only by overwhelming forensic evidence, including DNA matching, but also by his highly inculpatory testimony at both the guilt and penalty phases of his trial.

Teague's exception (Gray v. Netherland, 116 Ct. at 2085; Saffle v. Parks, 494 U.S. at 495)); and (3) occasions for invoking the Teague exception will be necessarily rare, as it is "unlikely that many such components of basic due process have yet to emerge" (Teague, 489 U.S. at 243).

Article 36(1)'s consular notification provisions do not constitute a basic component of due process, comparable to an accused's right to be represented by counsel. While post-arrest consular notification may aid a detained foreign national in arranging for counsel and in otherwise pursuing his defense against criminal charges, Breard, like all defendants charged in federal or state courts with serious charges, was constitutionally entitled to the assistance of counsel, and in fact appointed, competent counsel was furnished to him in this case.

C. Breard has also filed a petition for an original writ of habeas corpus in this Court. That petition does not provide any basis for overlooking his procedural default. In Felker v. Turpin, 116 S. Ct. 2333 (1996), this Court noted that its "authority to grant [original] habeas relief to state prisoners is limited by [28 U.S.C.] 2254, which specifies the conditions under which such relief may be granted to a person in custody pursuant to the judgment of a State court." Id. at 2339 (internal quotation marks omitted). The procedural default rules governing the availability of habeas corpus in the lower courts under Section 2254 (and in this Court on certiorari review therefrom) should also "inform [this Court's] authority to grant such relief as well" on a petition for an original writ. Ibid. Breard's claim based on the Vienna Convention presented on his petition for an original writ of habeas corpus should therefore be deemed barred by his procedural default.

III. NOTWITHSTANDING THE RECENT ORDER OF THE INTERNATIONAL COURT OF JUSTICE, PETITIONERS HAVE NOT SHOWN THAT A JUDICIAL STAY OF EXECUTION IS WARRANTED

A. The International Court of Justice (ICJ) has, upon an application by Paraguay against the United States, indicated provisional measures that ought to be taken, to the effect that "[t]he United States should take all measures at its disposal" to ensure that Breard is not executed pending the ICJ's final decision. The Executive Branch, on behalf of the United States, takes the order recently entered by the ICJ very seriously, even though the United States argued against that court's jurisdiction and against the indication of provisional measures. Accordingly, in response to the ICJ's order, the Secretary of State is today requesting that the Governor of Virginia stay Breard's execution. See App. F, infra.

What the Executive Branch of the federal government may or should do in response to the ICJ's order, however, is a different question from what the Judicial Branch may do in enforcing federal law that has been made applicable to create enforceable rights in court. As we explain below, the ICJ order does not alter the essence of the Court's task on the applications for a stay of execution. Moreover, stays of execution in capital cases are subject in general to the same standards as those governing stays in other cases. There must be a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari; there must a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed. Barefoot v. Estelle, 463 U.S. 880, 895-896 (1983). In addition, it may be appropriate, as in any stay application, to consider the harm to other parties that would result from the grant of a stay, and the public interest. See Rostker v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers). Application of those standards leads to the conclusion that a judicial stay of execution is not warranted.

B. As to the merits, we have explained above why respondents' various claims fail; we believe the law is sufficiently clear that a stay would not be warranted. Our view of the merits is not changed by the recent order of the ICJ. The indication of provisional measures by the ICJ does not represent even tentative agreement with the merits of Paraguay's argument to that court that the Vienna Convention provides a remedy of vacatur of a criminal conviction.[8] The indication of provisional measures is, therefore, significantly different from a grant of a preliminary injunction or application for a stay familiar to the Court under U.S. law. The ICJ's order notes, in fact, that "the existence of relief sought by Paraguay under the Convention can only be determined at the stage of the merits," 97-8214 Supplemental Brief in Support of Application for a Stay of Execution, Exh. C, ¶ 33, and that "measures indicated by the [ICJ] for a stay of execution would necessarily be provisional in nature and would not in any way prejudge the findings the Court might make on the merits," id. ¶ 40.

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[8] The United States has argued to the ICJ that the application brought by Paraguay does not come within that court's jurisdiction under the Optional Protocol for disputes arising under the Vienna Convention. We have argued that the case does (continued...)

C. As to the balance of hardships, there can be no doubt of the irreparable harm to Breard from the carrying out of his sentence of execution; but that irreparable harm, in and of itself, cannot warrant a stay of execution in the absence of a reasonably persuasive showing on the merits (unless every application for a stay of execution were to be granted). And, of course, the State of Virginia would be harmed by an order preventing it from carrying out its lawfully entered judgment of execution in a timely fashion, despite the fact that the sentence complies with constitutional requirements and that the arguments presented in these cases about the Vienna Convention provide no basis for relief.

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[8] (...continued)
not involve the "interpretation or application" of the Convention, within the meaning of the Optional Protocol, because it is not disputed that the Convention was violated, and because the Convention does not provide the remedy that Paraguay is seeking.

D. As to the public interest, petitioners contend that this Court should stay the execution, either as a matter of comity or (they argue) because the ICJ's order is binding. Concerning the issue of comity, we emphasize again that the Secretary of State is requesting that the Governor of Virginia stay Breard's execution. There is little prospect, therefore, that the international community will view the United States government's response to the ICJ's order as indicating disrespect to that court's processes.

As to the purportedly binding effect of the ICJ's order, there is substantial disagreement among jurists as to whether an ICJ order indicating provisional measures is binding. See *Restatement (Third) of Foreign Relations Law of the United States* § 903, Reporter's Note 6, at 369-370 (1986). The better reasoned position is that such an order is not binding. Article 41(1) of the ICJ statute provides that the ICJ shall have "the power to *indicate* any provisional measures which *ought to be taken* to preserve the respective rights of either power." Article 41(2) further states that, "[p]ending the final decision [of the ICJ], notice of the measures *suggested* shall forthwith be given to the parties and the Security Council." The use of precatory language ("indicate," "ought to be taken," "suggested") instead of stronger language (*e.g.*: the ICJ may "order" provisional measures that "shall" be taken) strongly supports a conclusion that ICJ provisional measures are not binding on the parties. The distinction in Article 41(2) between the "final decision" ultimately foreseen and the "measures suggested" in the interim also suggests that the "measures suggested" are not binding.

Petitioners have relied on the United Nations Charter to argue that provisional measures are binding, but the language of the Charter does not support that conclusion. Article 94(1) provides that "[e]ach member * * * undertakes to comply with the decision of the [ICJ] in any case to which it is a party." (Emphasis added.) "The decision," in the context of Article 94(1) of the Charter, evidently refers to the final decision of the International Court. Article 94(2) of the Charter elaborates that "[i]f any party to a case fails to perform the obligations incumbent upon it by a judgment rendered by the [ICJ], the other party may have recourse to the Security Council." (Emphasis added.) Significantly, the Security Council has never acted to enforce provisional measures indicated by the ICJ. See Restatement, supra, at 368 (discussing Security Council's response to ICJ's order indicating provisional measures in dispute between United Kingdom and Iran).

Moreover, the ICJ itself has never concluded that provisional measures are binding on the parties to a dispute. That court has indicated provisional measures in seven other cases of which we are aware; in most of those cases, the order indicating provisional measures was not regarded as binding by the respondent. See Restatement, supra, at 368-369 (discussing Australia and New Zealand v. France, 1975 I.C.J. 99, 106; United States v. Iran, 1979 I.C.J. 20-21; Nicaragua v. United States, 1984 I.C.J. 392, 422, and United Kingdom v. Iran, 1951 I.C.J. 89, 93-94); see also 1972 I.C.J. 17 (indicating provisional measures in United Kingdom v. Iceland). The ICJ did not, in any of the final decisions in those cases, suggest that the failure of the respondent to comply with the indication of provisional measures had violated the court's earlier order.

Finally, even if parties to a case before the ICJ are required to heed an order of that court indicating provisional measures, the ICJ's order in this case does not require this Court to stop Breard's execution. That order states that the United States "should" take all measures "at its disposal" to ensure that Breard is not executed. The word "should" in the ICJ's order confirms our understanding, described above, that the ICJ order is precatory rather than mandatory. But in any event, the "measures at [the government's] disposal" are a matter of domestic United States law, and our federal system imposes limits on the federal government's ability to interfere with the criminal justice systems of the States. The "measures at [the United States'] disposal" under our Constitution may in some cases include only persuasion -- such as the Secretary of State's request to the Governor of Virginia to stay Breard's execution -- and not legal compulsion through the judicial system. That is the situation here. Accordingly, the ICJ's order does not provide an independent basis for this Court either to grant certiorari or to stay the execution.

CONCLUSION

The petitions for a writ of certiorari should be denied. The applications for a stay should also be denied.

Respectfully submitted.

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APRIL 1998

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

REPUBLIC OF PARAGUAY, ET AL., PETITIONERS

v.

JAMES S. GILMORE, III, GOVERNOR OF VIRGINIA, ET AL.

ANGEL FRANCISCO BREARD, PETITIONER

v.

FRED W. GREENE, WARDEN

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The United States will address the following questions:

1. In No. 97-1390, whether the Vienna Convention on Consular Relations grants a foreign country or its representatives a judicially enforceable remedy of vacatur of a criminal conviction and sentence of one of its nationals, based on a past violation of Article 36(1)(b) of the Convention, requiring notification to an arrested foreign national of his right to have his country's consular representatives informed of his arrest.

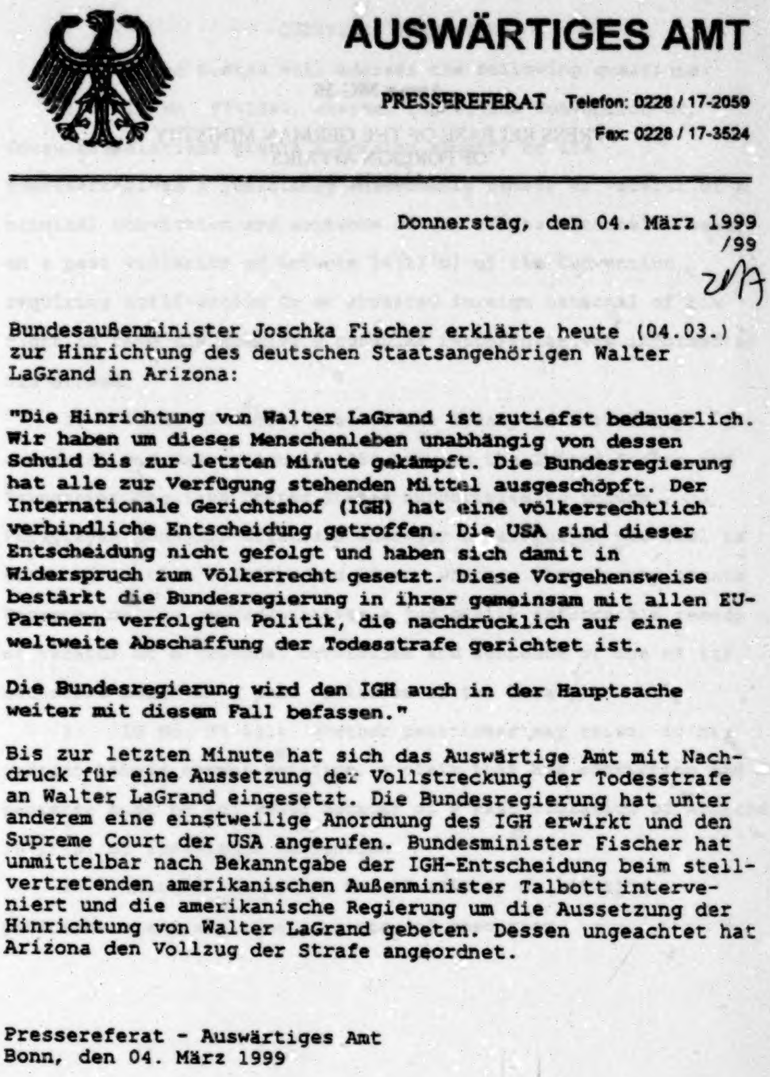
2. In No. 97-1390, whether the Treaty of Friendship, Commerce, and Navigation of 1859 between the United States and Paraguayan requires United States authorities to inform Paraguayan consular officials whenever a Paraguayan national is arrested in this country; and if so, whether that Treaty grants Paraguay or its representatives a judicially enforceable remedy of vacatur of a criminal conviction and sentence of one of its nationals based on a past violation of the Treaty.

3. In No. 97-8214, whether petitioner may raise, in his instant habeas corpus petition, a claim that his conviction and sentence must be set aside because of a past violation of Article 36(1)(b) of the Vienna Convention.

4. Whether, in either No. 97-1390 or No. 97-8214, petitioners are entitled to a stay of execution.

Annex MG 35

PRESS RELEASE OF THE GERMAN MINISTRY OF FOREIGN AFFAIRS
(4 MARCH 1999)



AUSWÄRTIGES AMT

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Fax: 0228 / 17-3524

Donnerstag, den 04. März 1999
/99
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Bundesaußenminister Joschka Fischer erklärte heute (04.03.) zur Hinrichtung des deutschen Staatsangehörigen Walter LaGrand in Arizona:

"Die Hinrichtung von Walter LaGrand ist zutiefst bedauerlich. Wir haben um dieses Menschenleben unabhängig von dessen Schuld bis zur letzten Minute gekämpft. Die Bundesregierung hat alle zur Verfügung stehenden Mittel ausgeschöpft. Der Internationale Gerichtshof (IGH) hat eine völkerrechtlich verbindliche Entscheidung getroffen. Die USA sind dieser Entscheidung nicht gefolgt und haben sich damit in Widerspruch zum Völkerrecht gesetzt. Diese Vorgehensweise bestärkt die Bundesregierung in ihrer gemeinsam mit allen EU-Partnern verfolgten Politik, die nachdrücklich auf eine weltweite Abschaffung der Todesstrafe gerichtet ist.

Die Bundesregierung wird den IGH auch in der Hauptsache weiter mit diesem Fall befassen."

Bis zur letzten Minute hat sich das Auswärtige Amt mit Nachdruck für eine Aussetzung der Vollstreckung der Todesstrafe an Walter LaGrand eingesetzt. Die Bundesregierung hat unter anderem eine einstweilige Anordnung des IGH erwirkt und den Supreme Court der USA angerufen. Bundesminister Fischer hat unmittelbar nach Bekanntgabe der IGH-Entscheidung beim stellvertretenden amerikanischen Außenminister Talbott interveniert und die amerikanische Regierung um die Aussetzung der Hinrichtung von Walter LaGrand gebeten. Dessen ungeachtet hat Arizona den Vollzug der Strafe angeordnet.

Pressereferat - Auswärtiges Amt
Bonn, den 04. März 1999

Annex MG 36

REPLY OF THE GERMAN GOVERNMENT TO AN INTERPELLATION FROM THE GERMAN BUNDESTAG (15 APRIL 1999)

Antwort
der Bundesregierung

auf die Kleine Anfrage der Abgeordneten Ulrich Irmer, Dr. Helmut Haussmann, Jörg van Essen, weiterer Abgeordneter und der Fraktion der F.D.P.
— Drucksache 14/586 —

Verhinderung der Todesstrafe

Allen Appellen, Protesten und rechtlichen Schritten zum Trotz wurden die deutschen Staatsangehörigen Karl und Walter LaGrand am 24. Februar und 3. März 1999 im Staatsgefängnis von Florence im US-Bundesstaat Arizona hingerichtet.

Nach den überraschenden Äußerungen des zuständigen Staatsanwaltes wenige Tage vor den Vollstreckungen steht nunmehr fest, daß die Strafverfolgungsbehörden bereits 1982, seit Beginn des Verfahrens, von der deutschen Staatsangehörigkeit der Brüder LaGrand Kenntnis hatten und die zuständige deutsche Auslandsvertretung dennoch nicht unterrichtet hatten. Hierin liegt ein Verstoß gegen die in Artikel 36 des Wiener Übereinkommens über konsularische Beziehungen festgelegten, auch für die USA verbindlichen völkerrechtlichen Pflichten. Dieser Verstoß ist um so gravierender, als inzwischen auch bestätigt wurde, daß die amerikanischen Behörden ihre Pflicht, die Brüder LaGrand über ihre Rechte nach Artikel 36 des Wiener Übereinkommens zu belehren, jahrelang nicht nur fahrlässig, sondern vorsätzlich mißachtet haben. Durch die vorsätzliche Verhinderung einer konsularischen Betreuung durch das deutsche Generalkonsulat in Los Angeles sind den Brüdern LaGrand erhebliche Verfahrensnachteile entstanden.

Die Hinrichtung der Brüder LaGrand, die Wiedereinführung der Todesstrafe in einigen US-Bundesstaaten und die dramatische Zunahme ihrer Vollstreckung gerade in jüngerer Zeit stehen überdies auch im eklatanten Gegensatz zu den weltweiten Bemühungen um die Abschaffung der Todesstrafe. Die frühere Bundesregierung war eine Mitinitiatorin dieser Kampagne im Rahmen der Vereinten Nationen. Erst vor zwei Jahren war es gelungen, in der VN-Generalversammlung eine neue Resolution zur Abschaffung der Todesstrafe einzubringen, der sich bis heute ca. 80 Staaten angeschlossen haben. Es ist inzwischen anerkannt, daß die Abschaffung dieser inhumanen Strafform zum menschenrechtlichen Mindeststandard rechtsstaatlicher Ordnungen gehört. Deshalb ist die Abschaffung der Todesstrafe u. a. auch eine zentrale Voraussetzung für die Mitgliedschaft im Europarat.

Die Antwort wurde namens der Bundesregierung mit Schreiben des Auswärtigen Amts vom 15. April 1999 übermittelt.
Die Drucksache enthält zusätzlich – in kleinerer Schrifttype – den Fragetext.

Die staatlich verfügte Hinrichtung eines Menschen, durch welche Todesart auch immer, ist auch schon deswegen unakzeptabel, weil die immer wieder behauptete Abschreckungswirkung bisher in keinem einzigen Fall nachgewiesen werden konnte. Zahlreiche Beispiele aus jüngerer Vergangenheit zeigen überdies, daß Justizirrtümer selbst bei dieser irreversiblen Strafform nicht ausgeschlossen sind. Besonders unakzeptabel ist es, zum Tode Verurteilte über Jahrzehnte in der Erwartung der unmittelbar bevorstehenden Hinrichtung in Todeszellen zu halten.

Im Hinblick auf eine Vielzahl von noch nicht abgeschlossenen Rechtsmittelverfahren gegen den Vollzug der Todesstrafe, insbesondere auch gegen weitere in den USA in Todeszellen einsitzende deutsche Staatsangehörige sind unverzügliche politische und rechtliche Schritte der Bundesregierung zur Verhinderung weiterer Hinrichtungen dringend erforderlich.

1. Zu welchem Zeitpunkt wurde die Bundesregierung davon unterrichtet, daß die Strafverfolgungsbehörden des US-Bundesstaates Arizona bereits zu Beginn des Verfahrens gegen die Brüder LaGrand 1982 von der deutschen Staatsangehörigkeit der Angeklagten Kenntnis hatten, dennoch die zuständige deutsche Auslandsvertretung hierüber nicht unterrichteten und somit vorsätzlich gegen Artikel 36 des Wiener Übereinkommens über konsularische Beziehungen verstoßen haben dürfen?

Amerikanische Behörden haben die deutsche Seite nie amtlich darüber unterrichtet, daß die Behörden des Staates Arizona bereits 1982 Kenntnis von der deutschen Staatsangehörigkeit der Brüder LaGrand hatten.

Durch eine entsprechende Aussage des amerikanischen Staatsanwalts in der Anhörung vor dem Gnadenausschuß am 23. Februar 1999, dem Tag vor der Hinrichtung von Karl LaGrand, wurde diese Tatsache erstmals der Bundesregierung bekannt.

2. Mit welcher Begründung hat die Bundesregierung die einstweilige Verfügung des IGH erst im Vorfeld der Hinrichtung von Walter LaGrand und nicht bereits vor der Hinrichtung von Karl LaGrand beantragt?

Bis zur Aussage des amerikanischen Staatsanwaltes vor dem Gnadenausschuß unmittelbar vor der Hinrichtung von Karl LaGrand gab es keine Anhaltspunkte dafür, daß die US-Behörden in vollem Wissen um die deutsche Staatsangehörigkeit von Karl und Walter LaGrand es seit 1982 unterlassen hatten, die Brüder LaGrand über ihre konsularischen Rechte nach Artikel 36 WÜK zu belehren. Dieses Bekanntwerden hat die Einschätzung des Falles grundlegend verändert.

Nachdem die Bundesregierung über diese Aussage unterrichtet worden war, hat sie sich nach einer Prüfung der Relevanz dieser Tatsachen und der Erfolgsaussichten für ein Verfahren vor dem Internationalen Gerichtshof entschieden. Sie hat unverzüglich alles Erforderliche für den alsbaldigen Erlaß einer vorsorglichen Maßnahme durch den Internationalen Gerichtshof (IGH) in die Wege geleitet und Klage in der Hauptsache eingereicht.

3. **Hätte nach Auffassung der Bundesregierung eine frühere Befassung des IGH dazu führen können, daß dieser nicht nur eine Verhaltensempfehlung ausgesprochen, sondern eine einstweilige Verfügung erlassen hätte?**

Anders als in der Frage unterstellt hat der IGH nicht nur eine Verhaltensempfehlung ausgesprochen, sondern eine verbindliche Entscheidung getroffen. Er hat am 3. März 1999, also noch vor der Hinrichtung von Walter LaGrand am 4. März 1999, dem Antrag der Bundesregierung auf Erlaß vorsorglicher Maßnahmen in vollem Umfange stattgegeben und den USA durch Beschluß gemäß Artikel 41 IGH-Statut in Verbindung mit Artikel 75 der Verfahrensordnung des IGH folgendes aufgegeben:

„Die USA haben alle ihr zur Verfügung stehenden Maßnahmen zu ergreifen, um sicherzustellen, daß die Hinrichtung von Walter LaGrand bis zu einer Entscheidung in der Hauptsache nicht vollstreckt wird."

Bekanntlich sind die USA der verbindlichen Entscheidung des IGH nicht gefolgt.

4. **Welches Ziel verfolgt die Bundesregierung mit der von ihr angekündigten weiteren Befassung des IGH in der Hauptsache?**

Die Bundesregierung verfolgt in dem Verfahren in der Hauptsache insbesondere das Ziel, die Völkerrechtswidrigkeit des Verhaltens der USA feststellen zu lassen, sowie von den USA eine verbindliche Zusicherung völkerrechtskonformen Verhaltens in vergleichbaren zukünftigen Fällen zu erhalten.

5. **In welcher Weise hat die Bundesregierung der amerikanischen Seite ihre öffentlich geäußerte Auffassung übermittelt, daß das Verhalten der amerikanischen Behörden ein Verstoß gegen geltendes Völkerrecht darstelle?**

In förmlichen Schreiben an US-Außenministerin Albright und an Gouverneurin Hull hat Bundesminister Joseph Fischer in aller Deutlichkeit zum Ausdruck gebracht, daß nach Auffassung der Bundesregierung das Verhalten der amerikanischen Behörden einen Verstoß gegen das WÜK darstellt. Zudem ist der US-Regierung auf diplomatischem Weg die Klageschrift im Verfahren vor dem IGH wegen Verstoßes gegen Artikel 36 WÜK sowie der Antrag auf Erlaß einer vorsorglichen Maßnahme mit entsprechender Begründung übermittelt worden.

Außerdem ist darauf hinzuweisen, daß sich Bundespräsident Roman Herzog, Bundeskanzler Gerhard Schröder und Bundesministerin Herta Däubler-Gmelin in Schreiben an Präsident Clinton bzw. an Justizministerin Reno und Gouverneurin Hull für die Brüder LaGrand eingesetzt haben.

6. **In welcher Weise hat die US-Regierung auf diese Vorhaltungen reagiert?**

Außenministerin Albright hat unter Verweis auf die Eigenständigkeit der Justiz der Bundesstaaten angeregt, die Bundesregierung möge sich an

Gouverneurin Hull wenden. Zu Artikel 36 WÜK hat sie sich nicht geäußert.

7. Hält die Bundesregierung die amerikanische Reaktion für hinreichend und angemessen?

Die US-Regierung hat sich wiederholt zur Einhaltung der völkerrechtlichen Verpflichtungen der USA bekannt. Die Bundesregierung hält aber den Verweis der US-Regierung auf die Eigenständigkeit der Bundesstaaten für nicht hinreichend.

8. Welche Maßnahmen beabsichtigt die Bundesregierung zu ergreifen, um zukünftig die uneingeschränkte konsularische Betreuung deutscher Strafgefangener in den USA sicherzustellen?

Die US-Regierung bekennt sich zu den völkerrechtlichen Pflichten, die sich aus Artikel 36 WÜK ergeben. Sie ist sich jedoch bewußt, daß nachgeordnete Behörden den Verpflichtungen aus Artikel 36 WÜK nicht immer nachgekommen sind. Die amerikanische Botschaft in Bonn hat daher von sich aus dem Auswärtigen Amt nach der (trotz Verstoß gegen Artikel 36 WÜK erfolgten) Hinrichtung des paraguayischen Staatsangehörigen Breard im Mai 1998 schriftlich versichert, ihren Verpflichtungen aus Artikel 36 WÜK nachkommen zu wollen. Das US-Department of State hat kürzlich erneut die Strafverfolgungsbehörden und Gefängnisverwaltungen der USA über diese Verpflichtungen unterrichtet.

Die Bundesregierung wird über das IGH-Verfahren hinaus die Verletzung des WÜK durch die Justiz der Bundesstaaten gegenüber der US-Regierung weiter thematisieren und auch bei den deutsch-amerikanischen Konsularkonsultationen im April 1999 ansprechen. Darüber hinaus greifen die deutschen Auslandsvertretungen in den USA jeden ihnen bekanntgewordenen Verstoß gegen Artikel 36 WÜK gegenüber den Behörden der betroffenen US-Bundesstaaten auf.

9. Wie viele weitere deutsche Staatsangehörige befinden sich gegenwärtig in amerikanischen Todeszellen bzw. in Strafverfahren, in denen die Anklage die Verhängung der Todesstrafe beantragt hat?

Der Bundesregierung sind drei Fälle bekannt, in denen in den USA deutsche Staatsangehörige von der Todesstrafe bedroht sind. In zwei Fällen sind die Rechtsmittelverfahren noch nicht abgeschlossen. Im dritten Fall wurde im Rechtsmittelverfahren der Schuldspruch aufrecht erhalten, die Straffestsetzung jedoch aufgehoben. Die Verteidigung und die Staatsanwaltschaft haben diese Entscheidung angefochten.

10. Ist in diesen Fällen die uneingeschränkte konsularische Betreuung der Angeklagten sichergestellt?

Eine uneingeschränkte konsularische Betreuung ist in diesen Fällen sichergestellt.

11. Welche rechtlichen und politischen Maßnahmen wird die Bundesregierung zur Verhinderung weiterer Vollstreckungen der Todesstrafe gegen deutsche Staatsangehörige in den USA ergreifen?

Deutschland und seine EU-Partner setzen sich seit Jahren weltweit für die Ächtung und Abschaffung der Todesstrafe ein. Dieses gemeinsame Engagement, das durch eine Entscheidung des EU-Ministerrats vom 29. Juni 1998 formalisiert und weiter verstärkt wurde, wird auch gegenüber den Vereinigten Staaten umgesetzt. Die Bundesregierung nutzt bei ihren Bemühungen um die Abschaffung der Todesstrafe alle Möglichkeiten, das Thema bilateral und multilateral gegenüber den amerikanischen Behörden anzusprechen. Die Bundesregierung wirbt nachdrücklich für den Beitritt der Vereinigten Staaten zu dem von Deutschland initiierten Zusatzprotokoll zum internationalen Pakt über bürgerliche und politische Rechte zur Abschaffung der Todesstrafe. Darüber hinaus werden Einzelfälle in den Vereinigten Staaten zum Tode Verurteilter von den Auslandsvertretungen Deutschlands und seiner EU-Partner genau beobachtet. Insbesondere wenn die in den internationalen Menschenrechtskonventionen niedergelegten Mindeststandards über die Rechte Angeklagter oder Verurteilter nicht eingehalten werden, werden gemeinsame EU-Demarchen ausgeführt.

Ein rechtliches Eingreifen in die laufenden amerikanischen Strafverfahren gegen die drei mit der Todesstrafe bedrohten deutschen Staatsangehörigen ist der Bundesregierung nicht möglich. Die Verteidigung vor Gericht kann nur von den Rechtsanwälten geleistet werden.

12. Welche konkreten Maßnahmen beabsichtigt die Bundesregierung zur Erreichung des von ihr angestrebten Zieles einer weltweiten Abschaffung der Todesstrafe?

Die Bundesregierung hat in den letzten Monaten zusammen mit den EU-Partnern ihre Anstrengungen im Rahmen der internationalen Menschenrechts-Politik deutlich intensiviert. Ziel ist es, zunächst die Anzahl der Todesurteile bzw. Vollstreckungen weltweit zu reduzieren und auf Vollstreckungsmoratorien hinzuwirken. Hierzu wurde die Zahl unserer Demarchen in Einzelfällen erhöht. Diese Demarchen betreffen vor allem Fälle besonderer Schutzbedürftigkeit des Verurteilten (Jugendliche, Geisteskranke), die drohende Wiederaufnahme von Hinrichtungen nach Moratorien, die Verhängung für andere Delikte als „schwerste Verbrechen", etwa für Wirtschaftsvergehen, die Verletzung internationaler Verpflichtungen des anwendenden Staates oder die Vollstreckung nach besonders langer Haftzeit. Auf dieser Grundlage hat die EU in den letzten Monaten Demarchen u. a. in den USA, Karibikstaaten, Philippinen und bei der Palästinenser-Behörde durchgeführt.

Neben Einzelfall-Demarchen verfolgen Deutschland und seine EU-Partner auch in allgemeiner Form das Ziel der Abschaffung der Todesstrafe.

Unter deutschem Vorsitz wird die EU auf der am 22. März 1999 begonnenen 55. Sitzung der Menschenrechtskommission der Vereinten Nationen (MRK) erstmals die bisher von Italien betreute Resolution zur Abschaffung der Todesstrafe einbringen. Wesentliche Elemente der Resolution werden sein: Eine Aufforderung, den rechtlichen Instrumenten zur Abschaffung der Todesstrafe beizutreten (vor allem dem von Deutschland initiierten 2. Zusatzprotokoll zum Zivilpakt zur Abschaffung der Todesstrafe), ein Aufruf an Staaten mit Todesstrafe, rechtliche Mindeststandards zu wahren, die Zahl der Delikte, für die die Todesstrafe angedroht ist, zu reduzieren, und Hinrichtungsmoratorien einzuführen. Der Text der diesjährigen Resolution enthält auch ein Ersuchen, Personen nicht an Staaten auszuliefern, in denen ihnen die Todesstrafe droht und den Aufruf an Staaten, deren Recht die Todesstrafe vorsieht, vor einer Hinrichtung die Ergebnisse sowohl internationaler als auch nationaler Verfahren abzuwarten. Zugunsten dieser Resolution führt das Auswärtige Amt zur Zeit eine weltweite Unterstützungskampagne über die deutschen Botschaften durch.

Die Bundesregierung wird – in Zusammenarbeit mit dem Europarat – während der MRK in Genf ein Seminar zur Abschaffung der Todesstrafe ausrichten. In wissenschaftlichen Beiträgen von Kriminologen, Strafrechtswissenschaftlern und Soziologen sollen die verschiedenen Aspekte der Todesstrafenproblematik behandelt werden.

Annex MG 37

LETTER OF U.S. SECRETARY OF STATE ALBRIGHT TO THE GOVERNOR OF VIRGINIA

(13 APRIL 1998)

THE SECRETARY OF STATE
WASHINGTON

April 13, 1998

Dear Governor Gilmore:

I am writing to request a stay of the execution of Angel Francisco Breard, who is sentenced to be executed by the Commonwealth of Virginia tomorrow, April 14.

The United States has throughout vigorously defended Virginia's right to go forward with the sentence imposed on Mr. Breard by Virginia's courts. Counsel for the U.S. Government argued strongly before the International Court that the Court should not issue the relief sought by Paraguay. We maintain, for the reasons we presented to the Court at its hearing last week, that consular notification would not have changed the outcome and that the Vienna Convention on Consular Relations does not require that Mr. Breard's conviction and sentence be vacated.

The International Court, however, was not prepared to decide the issues we raised in its urgent proceedings last week. Using non-binding language, the Court said that the United States should "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings." The Court concurrently set an expedited briefing schedule in the case, apparently intending to hold its final hearing this fall.

In light of the Court's request, the unique and difficult foreign policy issues, and other problems created by the Court's provisional measures, I therefore request that you exercise your powers as Governor and stay Mr. Breard's execution. It is only with great reluctance that I make this request, especially given the aggravated character of the crime for which Mr. Breard has been convicted and sentenced and our view of the merits of Paraguay's legal claims. As Secretary of State, however, I have a responsiblity to bear in mind the safety of Americans overseas.

The Honorable
James S. Gilmore III,
Governor of Virginia,
Richmond, Virginia.

I am particularly concerned about the possible negative consequences for the many U.S. citizens who live and travel abroad. The execution of Mr. Breard in the present circumstances could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the Convention. The immediate execution of Mr. Breard in the face of the Court's April 9 action could be seen as a denial by the United States of the significance of international law and the Court's processes in its international relations and thereby limit our ability to ensure that Americans are protected when living or travelling abroad.

I appreciate the difficulty of this matter. The Legal Adviser of the Department, David Andrews, will call your Counselor, Mr. David Anderson, regarding it.

Over the past year, the Department of State has worked with all of the States to improve the regime of consular notification. We appreciate the cooperation we have received from the Commonwealth on these issues.

Sincerely,

Madeleine Albright

Madeleine K. Albright

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